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Bringing the Bar to Justice: A Comparative Study of Six Bar Associations

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THE FLORIDA EXPERIENCE IN PUBLIC EMPLOYEE COLLECTIVE BARGAINING, 1974-1978: BELLWETHER FOR THE SOUTH

WILLIAM F. McHUGH

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THE FLORIDA EXPERIENCE IN PUBLIC EMPLOYEE COLLECTIVE BARGAINING, 1974-1978: BELLWETHER FOR THE SOUTH

WILLIAM F. McHUGH*

I. INTRODUCTION

This article is written basically for labor relations practitioners in Florida, as well as for labor scholars interested in comparative state law. One primary purpose is to provide information to public officials in the Southeast, where public sector labor legislation may be contemplated.

Florida is the first southern state with a comprehensive public employment relations act covering all public workers. Pressure for such legislation may be characteristic of rapidly growing states, such as Florida, with expanding urban populations. In the past decade, both state and local governmental services in Florida have substantially expanded, and the number of public employees has increased to the extent that government has become a major employer in the state's economy.¹

In order to summarize the overall Florida experience, it is important to include details of the law, to give examples of its practical application, and to focus on those peculiar legal traditions which have influenced the state's labor policy. Specifics are necessary in order to provide the concreteness sought by comparative state law scholars, but an encyclopedic case summary was rejected as likely to induce myopia. The general perspective is historical, with de-

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1. In 1967, an average of 269,400 people were employed in Florida as state and local government workers. By 1976, the figure had risen to 469,900. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, FORM BLS 58-3171 (1977). During these same years, Florida's population increased from 6,288,700 to 8,551,814. See BUREAU OF ECONOMIC & BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, FLORIDA STATISTICAL ABSTRACT 1975 (1975); Bureau of Economic & Business Research, University of Florida, Florida Estimates of Population, July 1, 1977, State, Counties and Municipalities 34 (Feb. 1978).

tailed treatment of those areas which have tended to crystallize, such as unit determinations, and selective omission of areas where decisional trends and experience seemed uneven or unduly speculative.

Vigorous organizational efforts by firefighters and school teachers, highlighted by a statewide teachers' strike in 1968, led to collective bargaining for public employees in Florida.² The Florida experience is unique in that the right to bargain collectively was not granted by statute but rather was adopted by the people in 1968 when they approved a revised state constitution.³ Article I, section 6 of the Florida Constitution now provides:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.⁴

In 1969, in *Dade County Classroom Teachers' Association v. Ryan*, the Florida Supreme Court held that, with the exception of the right to strike, "public employees" have the same collective bargaining rights as private employees under the Florida Constitution.⁵ The *Ryan* court acknowledged that Florida public employees have a constitutional right to bargain collectively and public employers have the right to engage in collective bargaining with employee organizations. However, more questions were raised than were answered by *Ryan*.

For example, the *Ryan* decision did not resolve the following: How should organizational rights be protected? What agency would oversee the collective bargaining process and define bargaining units? And what procedures should be followed in the event of negotiation impasse? The court pointed out the need for legislation.⁶

2. See FLA. STAT. §§ 447.201-.609 (1977), commonly known as the Public Employees Relations Act (PERA). See also note 25 *infra*. For a comprehensive discussion of the history of collective bargaining by public employees in Florida prior to passage of PERA, see McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future*, 1 FLA. ST. U.L. REV. 26, 28-58 (1973).

3. Although three other states make some sort of reference to employees' rights in their constitutions, only the Florida Constitution specifically grants *all* employees the right to bargain collectively. See HAW. CONST. art. XIV, § 2; N.J. CONST. art. I, § 9; PA. CONST. art. III, § 31.

4. For a detailed legislative history of this provision, see McGuire, *supra* note 2, at 42.

5. 225 So. 2d 903, 905 (Fla. 1969). The circuit court held, among other things, that public employee collective bargaining ran counter to the public policy of the State of Florida. The Florida Supreme Court disagreed. See *id.*

6. Speaking for the majority in *Ryan*, the chief justice urged the legislature to "enact

Ryan further confused matters by holding that a statute substantially restating the constitutional provision precluded a labor organization from acting as the sole or exclusive bargaining agent for all employees in a given bargaining unit.⁷ The court implied that a proportional representation scheme would be appropriate.⁸ Collective bargaining through proportional representation would be very different from collective bargaining as it is generally understood in the United States. The doctrine of exclusivity is uniformly accepted; that is, the certified representative for the bargaining unit represents all employees in the unit, whether they are members of the employee organization or not.⁹

Efforts to use *Ryan* on behalf of state workers met with initial resistance. Governor Claude Kirk issued an executive order in 1970 prohibiting state agencies from bargaining collectively with state workers.¹⁰ This executive order may have been grounded upon dubious authority in the light of Florida's cabinet system of executive government. Kirk's order had to be rationalized primarily upon gubernatorial authority over the budget process and personnel rules.¹¹ Even so, it dramatized how little the *Ryan* decision had done, practically speaking, to assure collective bargaining for public workers.

Upon succeeding Kirk in 1971, Governor Reubin Askew issued an executive order echoing the Kirk order in many respects.¹² Unlike Kirk, however, Askew did not oppose collective bargaining by public employees. He pointed out in a subsequent executive order in 1972 that the legislature had not implemented the constitutional right of public employees to bargain collectively which had been recognized by the supreme court.¹³ The legislature then turned its attention to

appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6." *Id.* at 906.

Private employees' collective bargaining rights are likewise unclear. See McGuire, *supra* note 2, at 45. No statute exists in Florida which outlines the rights of private employees who are not covered under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1970). Bills have been introduced to cover farm workers, but no bill has yet passed. Florida House Bill 3095, introduced in 1976, would have added a Part III to FLA. STAT. ch. 447 and created an Agricultural Labor Relations Commission similar to PERC. HB 3095 died in committee. For an example of a farm labor statute, see CAL. LAB. CODE §§ 1140-66.3 (West Supp. 1977).

7. Act of June 3, 1959, ch. 59-223, 1959 Fla. Laws 859 (repealed 1975) (formerly found at FLA. STAT. § 839.221).

8. 225 So. 2d 903, 907.

9. See I PUB. EMPL. BARG. (CCH) ¶ 1000 (1977). See *Lullo v. Fire Fighters Local 1066*, 262 A.2d 681 (N.J. 1970) (upholding exclusivity doctrine under New Jersey's public labor act), for a good discussion of the doctrine of exclusivity in private and public sector labor relations.

10. Fla. Exec. Order (unnumbered) (May 13, 1970).

11. See McGuire, *supra* note 2, at 48.

12. Fla. Exec. Order No. 71-20 (Apr. 5, 1971).

13. Fla. Exec. Order No. 72-1, 2-3 (Jan. 10, 1972).

implementing legislation.¹⁴

Many local governments refused to bargain collectively absent statutory guidelines. This resulted in a rash of local court decisions seeking to clarify the legal responsibilities attending collective bargaining. Piecemeal and inconsistent responses by local circuit courts proved inadequate to meet what was essentially a statewide problem.¹⁵ Finally, in November, 1972, the Dade County Classroom Teachers' Association filed an original petition for a constitutional writ in the nature of mandamus, requesting the Florida Supreme Court to order the legislature to show cause "why it has failed and refused to enact collective bargaining guidelines."¹⁶

The teachers' union also asked the court to appoint a commission to recommend bargaining guidelines for adoption by the court if the legislature did not explain its failure to act.¹⁷ The court concluded that its intervention would be premature unless the legislature failed to act within a reasonable time. In that event, the court said it would have no choice but to develop guidelines by judicial decree.¹⁸ The court noted that, although the legislature faced many pressing concerns in 1972, it had managed to find time to adopt standards and guidelines for collective bargaining for firefighters. Yet no such standards and guidelines were approved for other groups of public employees.¹⁹

The bill which proved to be the forerunner of the present Florida Public Employees Relations Act was introduced in the regular legis-

14. See McGuire, *supra* note 2, at 56-57.

15. See, e.g., *State ex. rel. Firefighters Local 2019 v. Board of County Comm'rs*, 254 So. 2d 195 (Fla. 1971); *State ex rel. Fraternal Police, Orlando Lodge No. 25 v. City of Orlando*, 269 So. 2d 402 (Fla. 4th Dist Ct. App. 1972).

In *International Ass'n of Firefighters v. City of Homestead*, No. 72-9285 (Fla. 11th Cir. Ct. 1973), the city manager and the union reached accord after 50 hours of negotiation. The agreement and the recommendation of approval by the city manager were submitted to the city council, which proceeded to renegotiate the entire contract and change every provision. One city councilman made statements before the court concerning his dislike of unionism and his unwillingness to bargain. He promised benefits to the firemen if they would abandon the union and also promised that the firemen would have salary parity with city policemen if they would forget the union. The action was brought by the union to enforce the firemen's rights to bargain collectively. The court held that the city was conducting only surface bargaining and that its attempt to renegotiate was not made in good faith. The court observed that public officers should be held to faithful performance of their duties and made to answer in damages to all persons whose constitutional right to bargain collectively was wilfully denied.

16. *Dade County Classroom Teachers' Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972); see McGuire, *supra* note 2, at 50 n.94.

17. McGuire, *supra* note 2, at 51-52.

18. 269 So. 2d at 688.

19. *Id.* at 687. See generally Act of Apr. 21, 1972, ch. 72-275, §§ 1, 20, 1972 Fla. Laws 998 (repealed 1974) (formerly found at FLA. STAT. §§ 447.20, .35). Firefighters have considerable political leverage because of the essential nature of their services.

lative session in 1972.²⁰ Essentially the same bill was reintroduced in the 1973 legislative session.²¹ Despite the recommendations of Governor Askew,²² the legislature refused to heed the court's admonition. Once again, the lawmakers failed to provide the needed guidelines to implement fully the constitutional right of Florida public employees to bargain collectively.

The Florida Supreme Court then took an unusual step. In the late fall of 1973, the court appointed the Supreme Court Public Employees Rights Commission to recommend to the court guidelines for judicial implementation of collective bargaining.²³ In early 1974, the newly appointed commission held public hearings, inviting comments and suggestions about what should be included in the recommended guidelines. Numerous employee and employer organizations made proposals. In April, 1974, the commission submitted its proposed guidelines to the court. These guidelines were somewhat more favorable to employee unions than either the legislation which had previously been introduced in the legislature or the legislation which ultimately was enacted.²⁴

This action by the Florida Supreme Court proved a powerful incentive. In 1974, the legislature enacted the Public Employees Relations Act (PERA), implementing the constitutional command of collective bargaining in Florida.²⁵ A reluctant legislature was prod-

20. For a brief history of Fla. HB 3314's demise in the 1972 session, see McGuire, *supra* note 2, at 57-58.

21. For an analysis of the provisions of HB 3314, see McGuire, *supra* note 2, at 59-129. In 1973, Fla. HB 2028 was on the calendar when the house adjourned. A similar bill, Fla. SB 1060, died in the Senate Judiciary Committee.

22. In his addresses to the legislature in 1972 and 1973, Governor Askew called upon the lawmakers to "implement state constitutional guarantees . . . of collective bargaining for public employees." FLA. H.R. JOUR. 10 (2d Reg. Sess. 1972); see FLA. H.R. JOUR. 6 (1st Reg. Sess. 1973).

23. The members of the commission were: Louis de la Parte, President of the Florida Senate, Tampa, Florida; William McHugh, Professor of Law, Florida State University College of Law, Tallahassee, Florida; Albert S.C. Miller, Jr., Attorney, Jacksonville, Florida; Dr. Jules O. Pagano, Dean of Program Development & Evaluation, Florida International University, Miami, Florida; Ben Patterson, Chariman, Bureau of Workmen's Compensation, Florida Department of Commerce, Tallahassee, Florida; Raymond Sittig, Executive Director, Florida League of Cities, Tallahassee, Florida; Dr. James T. Campbell, Retired Associate Commissioner of Education, State of Florida; and Don Tucker, Speaker of the Florida House of Representatives, Tallahassee, Florida.

24. For example, the commission recommended that "interest" disputes be subject to binding arbitration. This recommendation is not reflected in PERA. The report and recommended guidelines are on file with the Clerk of the Florida Supreme Court.

25. Act of May 30, 1974, ch. 74-100, 1974 Fla. Laws 134 (codified at FLA. STAT. §§ 447.201-.609 (1977)).

Technically, the act has no title which specifically designates it as the "Public Employees Relations Act." It had sometimes been called the "Tucker Act" after Don Tucker, Speaker of the Florida House of Representatives and one of the primary backers of the Act. Speaker

ded by an insistent court into enforcing the Florida Constitution. A new era involving a new relationship between public employers and public employees in Florida had begun.

II. PUBLIC EMPLOYEES RELATIONS ACT

A. *Recording the Florida Experience Under PERA*

Understandably, three years have not produced many significant appellate court decisions construing the Public Employees Relations Act (PERA). Likewise, there were few amendments to the statute until 1977.²⁶ The appellate courts have not yet construed the 1977 amendments. Thus, most of the Florida experience with PERA has been shaped in the field.

With few exceptions, this experience has not been authoritatively documented. Unionization has taken place primarily at the local government level among firemen, policemen, and schoolteachers. At the state level, with the exception of the university system, union elections have been held in four units within the past two years; a fifth election was scheduled for May 18, 1978.²⁷

Whether or not the Florida Public Employees Relations Commission (PERC) should provide such information as the number of impasses, means of settlement, contract listings and surveys, economic studies, number of unions and their membership, reports on elections results, or number of unfair labor practice charges processed, it has had neither staff nor resources to do so. Rather, the PERC staff has been occupied primarily with keeping decisions and orders current. As a result, reliable statistics are often unavailable.²⁸

Tucker was also much involved in drafting Fla. HB 3314 and introducing it in the 1972 legislative session.

26. In 1976, the definitional section of PERA was amended to exclude employees of the Florida Legislature and school principals and assistant principals from participation in collective bargaining. Act of June 27, 1976, ch. 76-269, 1976 Fla. Laws 730 (current version at FLA. STAT. § 447.203(2) (1977)); Act of May 31, 1976, ch. 76-39, 1976 Fla. Laws 75 (current version at FLA. STAT. § 447.203(3)(e) (1977)).

27. State elections have been held for the law enforcement, human services, health care professionals, professionals, and operational services units. By comparison, there are teachers' contracts with 64 school districts (out of a possible 67), according to records at the Florida School Board Association. Statistics on the status of public employee union activity in Florida are presently being compiled by the author under a grant from the State of Florida and will become available during the summer of 1978.

28. Since the law was enacted, there have been three chairmen, one acting chairman, at least six different per diem commissioners, and three general counsel at the Public Employees Relations Commission. This turnover may have inhibited development of a long-range program of statistical information gathering and dissemination.

B. Key Provisions of PERA

1. Basic Organizational Rights

Rights similar to those included in section 7 of the National Labor Relations Act are also guaranteed to Florida's public workers under PERA.²⁹ Employees in Florida may form, join, and participate in any employee organization of their choosing. And they may negotiate and bargain collectively.³⁰ A corresponding duty to bargain in good faith is imposed by the statute on the public employer.³¹ Since the enactment of PERA, there have been no Florida court cases challenging the right of public employees to organize and bargain collectively through an elected representative. At the very least, then, the basic holding of the Florida Supreme Court in *Ryan* has now been implemented.

2. Structure, Power and Duties of PERC

The Public Employees Relations Commission is a part of the Florida Department of Commerce, which is a state agency under the Governor performing many of the functions of a department of labor. Although PERC is legally a part of the Department of Commerce, PERA provides that in the performance of its duties and powers PERC "shall not be subject to control, supervision, or direction by the Department of Commerce."³²

Prior to the adoption of the 1977 amendments, the commission was composed of five persons appointed by the Governor and confirmed by the senate for staggered four-year terms.³³ These gubernatorial appointees were to be chosen from among persons "representative of the public, known for their objective and independent

29. 29 U.S.C. § 157 (1970) (right of employees to organize and bargain collectively).

30. FLA. STAT. §§ 447.203(14), .301(1)-(2) (1977) (public employees' right to organize and bargain collectively). FLA. STAT. § 447.03 (1977) likewise guarantees employees the right to form, join, and assist labor unions and labor organizations or to refrain from such activity. Although no court decisions have held that this section applies to public as well as private employees, an argument may be made that it does. FLA. STAT. § 447.17 (1977) provides a remedy for violation of the rights guaranteed by § 447.03, allowing damages sustained plus costs of suit and reasonable attorney fees. Provision is made for the award of punitive damages if the defendant acted "willfully and with malice or reckless indifference to the rights of others . . ." Injunctive relief is also available. In 1977, the Florida Legislature amended § 447.17 by providing that the relief under this section shall not be available to public employees. Act of June 24, 1977, ch. 77-343, § 9, 1977 Fla. Laws 1476.

31. FLA. STAT. § 447.309(1), .501(1)(c) (1977) (duty of public employer to bargain in good faith).

32. *Id.* § 447.205(1), (3).

33. Act of May 30, 1974, ch. 74-100, § 3, 1974 Fla. Laws 134 (current version at FLA. STAT. § 447.205(1) (1977)).

judgment”³⁴ They were not allowed to hold any commission with any governmental unit or any employee organization.³⁵ Under the original statute, one commissioner was designated by the Governor as chairman and served as a fulltime executive officer; the other four commissioners served part-time and were paid on a per diem basis.³⁶

The number of commissioners was reduced in 1977 to three full-time members and one part-time alternate member.³⁷ While in office, the members may not be employed by nor hold any commission with any other governmental unit in the state or with any employee organization.³⁸ The 1977 amendments also provided that no more than one appointee may be a person who has previously been a representative of employers nor may more than one who has been a representative of employee organizations.³⁹ Full-time commissioners must devote all their time to commission duties and may not engage in any other business, vocation, or employment while in office.

The new terms are also for four years. Beginning July 1, 1977, one member was appointed for a term of one year, one member for two years, one member for three years, and the alternate member for four years. In this way, a measure of continuity is achieved.

The commissioners serve at the pleasure of the Governor, who, as under the previous law, designates one member as chairman. The chairman is responsible for the administrative functions of the commission. He has authority to employ the necessary personnel to do the commission's work. He may also call the alternate commissioner to serve when his presence is necessary to complete a quorum (three members) to conduct PERC business.⁴⁰ The chairman receives an annual salary of \$38,000. The other full-time commissioners are paid \$36,000 per year. The alternate commissioner is paid \$200 for each day spent on commission work.⁴¹

Under the 1977 amendments, deliberations of the commission are exempt⁴² from the provisions of Florida's "Sunshine Law."⁴³ How-

34. *Id.*

35. *Id.*

36. *Id.* (current version at FLA. STAT. § 447.205(2) (1977)).

37. Act of June 24, 1977, ch. 77-343, § 7, 1977 Fla. Laws 134 (codified at FLA. STAT. § 447.205(1) (1977)).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (codified at FLA. STAT. § 447.205(2) (1977)). The 1977 amendments further make provisions for certain internal matters such as printing costs, publications, property, offices, personnel services, rentals, and establishment of a trust fund to receive proceeds from the sales of records and other publications. *Id.* (codified at FLA. STAT. § 447.205(5)(a) (1977)).

42. FLA. STAT. § 447.205(10) (1977).

ever, any hearing or oral argument held by the commission pursuant to the state Administrative Procedure Act⁴⁴ or chapter 447 of the Florida Statutes is open to the public.⁴⁵ All draft orders developed in preparation for, or preliminary to, the issuance of a final written order by the commission are exempt from the provisions of the Public Records Act.⁴⁶

The commission is given wide authority to promulgate rules, subpoena witnesses and documents, enforce its orders in court, maintain lists of and appoint mediators and special masters (fact-finders), prosecute unfair labor practices, define and approve bargaining units, and certify bargaining agents.⁴⁷ A 1977 amendment directs PERC to promulgate rules providing for an expedited proceeding to determine questions relating to scope of negotiations or certain unfair labor practices. Disposition through such promulgation constitutes final agency action for purposes of judicial review.⁴⁸ As discussed *infra*,⁴⁹ PERC has dealt only tangentially with the scope of negotiation issues. Usually such dealings have been in the context of alleged violations of good faith bargaining in unfair labor practice proceedings.

Employee organizations are required by law to register and to file with PERC financial statements, income and expense statements, loan statements, bylaws and constitutions, and pledges to comply with state law and accept members without regard to age, race, or sex. An organization which does not register with PERC cannot request recognition from a public employer or submit a petition for a representation election.⁵⁰

The fundamental issue of PERC's independence and integrity as a neutral commission has not yet been addressed fully by the Florida Legislature or by other state decisionmakers. There are a number of reasons for this. The turnover among PERC chairmen (three in two and one-half years) impeded the commission's ability to

43. *Id.* § 286.011.

44. *Id.* ch. 120.

45. *Id.* § 447.205(10).

46. *Id.* This is in accord with the Florida Supreme Court's decision in *Bassett v. Brad-dock*, 262 So. 2d 425 (Fla. 1962), discussed at text accompanying notes 392-400 *infra*.

47. FLA. STAT. § 447.207(1)-(5) (1977). Section 447.207(1) provides that PERC's rulemaking authority must be exercised in accordance with the provisions of the Administrative Procedure Act.

48. Act of June 24, 1977, ch. 77-343, § 8, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.207(7) (1977)). PERC has held that this procedure is not applicable to actions which have already taken place, but rather is designed to "provide guidance with respect to future action which is contemplated by the requesting party." *In re Broward County Employees Local 532, AFSCME, AFL-CIO*, No. DS-77-005, 77D-473 (Fla. PERC Nov. 21, 1977).

49. See notes 232-42 and accompanying text *infra*.

50. FLA. STAT. § 447.305(1) (1977).

advocate needed administrative changes and clarify its proper role. Until recently, there had been a total failure to appreciate PERC's function as an adjudicatory body, requiring the independence associated with such a role. Due to the lack of experience with public-sector bargaining, PERC initially was perceived as just another state executive agency.

PERC is not a typical state agency. It must gain increased independence if collective bargaining in Florida is to be a productive process. Maximum freedom in budgetary requests, expenditures, and job classifications is essential to a neutral and independent public labor board. Such freedom will be especially critical as unionization of state workers increases. Gubernatorial control of PERC, either directly or by means of another state agency, is incompatible with PERC's neutral mission. Executive control will inevitably generate conflicts of interest in matters affecting the state as public employer.

While PERA prohibits administrative control by the Department of Commerce, PERC is treated like any other state agency in other respects. For example, the Florida State Department of Administration (DOA) supervises state budget matters and establishes personnel policies for Florida's state agencies. While it is true that DOA does not administer PERC directly, DOA does approve PERC's budget and expenditures and classifies its staff and salaries.⁵¹ DOA, representing the employer, is also responsible for developing and implementing policies on employee relations for all state agencies.⁵² This authority includes representing the Governor as chief executive and the state as employer in collective bargaining negotiations with state workers' unions.⁵³

For example, assume that DOA sought approval from PERC of managerial exclusions of certain workers from collective bargaining at a time when PERC itself was seeking position reclassification from DOA for PERC's staff attorneys. Steps should be taken to divest potential administrative influence over PERC by an executive agency responsible for representing the chief executive in collec-

51. See *id.* ch. 216 (planning and budgeting, Department of Administration). It should be noted that PERA was amended in 1977 to set the salaries of PERC commissioners. Act of June 24, 1977, ch. 77-343, § 7, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.205(2) (1977)). Previously, DOA set the chairman's salary. FLA. STAT. § 216.251 (1977).

52. FLA. STAT. § 110.022 (1977).

53. State employees have been divided into seven statewide bargaining units through the rulemaking process. Four of these units have reached contracts through negotiations with DOA: the nurses, policemen, human services personnel, and skilled professionals. The agreements are on file with the Florida Department of Administration, Office of Employee Relations, in Tallahassee, Florida.

tive bargaining with state workers. Such influence exposes PERC to political vicissitudes which could undermine the neutral and independent PERC role envisioned by PERA.

The legislature has been somewhat ambivalent on this matter. On the one hand, PERC Chairman Carson and others have been successful in persuading the legislature to strengthen both PERC's adjudicatory role and its efficiency. Certain of the 1977 amendments dealing with PERC have been progressive. Creation of three full-time commissioners at reasonable salary levels and exemption of PERC deliberations from the "sunshine" provisions of the Florida Statutes were proper moves toward reinforcing PERC's role as an adjudicatory body. It is hoped that the legislature soon will take measures to make the budgetary supervision and the personnel classification of PERC more closely resemble the fiscal relationship which exists between the legislature and the appellate courts than that which prevails between the chief executive and the executive agencies.

Yet, ambivalence about PERC's independence persists because the 1977 amendments to PERA also provided that PERC commissioners "shall serve at the pleasure of the Governor."⁵⁴ This provision should be eliminated in order to reduce the possibility of future political interference and to foster the neutrality of PERC. Once commissioners are appointed and confirmed, they should be removed during their term of office only for cause. Consideration should be given to extending the term of office from four to six years. The integrity of PERC must ultimately be measured by its independence from both employer and union interests. The Governor and the legislature should strive to maintain the independence of PERC, protect it from dominance by executive agencies, and encourage PERC's role as an adjudicatory and neutral body.

3. *Definitions*

a. *"Public Employer"*

As defined in the Public Employees Relations Act, "public employer" includes the state and any county, municipality, or special district (*i.e.*, school board) of the state. It also includes any subdivision or agency of one of these entities which PERC determines has "sufficient legal distinctiveness" to bargain collectively and administer a collective bargaining agreement.⁵⁵ The 1977 amendments

54. Act of June 24, 1977, ch. 77-343, § 7, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.205(1) (1977)).

55. FLA. STAT. § 447.203(2).

made the Governor the "public employer" for any statewide bargaining unit composed of career service employees.⁵⁶

PERC is mandated by law to define a functional bargaining unit in such a way that the appropriate government and its officials will be able to negotiate effectively and maintain a collective bargaining relationship.⁵⁷ If the unit is too large or too small, or if it involves the wrong combination of officials, this may not be possible. In defining a proposed bargaining unit, the commission is also required by statute to consider such factors as "the principles of efficient administration of government"⁵⁸ and the number of employee bargaining units with which the employer might have to negotiate.⁵⁹ The organizational structure of the public employer must also be considered.⁶⁰

Florida is somewhat unique in that the Board of Regents is designated by statute as the public employer for the faculty, administrative, and professional employees of the state universities.⁶¹ Likewise, community college trustees are defined as the "public employers" of all employees of the state community colleges.⁶²

The definition of public employer is critical. The nature of the bargaining process requires an identification of managerial authority responsible for conducting collective bargaining. In dealing with statewide employee bargaining units, the negotiating authority for the government must reside somewhere in the higher levels of the state bureaucracy. In Florida, the key to the public labor scheme is to identify the level of authority capable of making "an effective recommendation."⁶³ If a body is capable of making "an effective recommendation," it is appropriate for designation as a "public employer."

There are a few states besides Florida which place bargaining authority for the state university system in the system's governing

56. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(2) (1977)). Prior to 1977, the Board of Regents may have been the "public employer" for its career service employees because the pre-1977 PERA provided that the Board of Regents was the public employer of "other public employees of the university system not otherwise determined" by PERC as properly belonging to a statewide bargaining unit composed of state career service employees. Act of May 30, 1974, ch. 74-100, § 3, 1974 Fla. Laws 134 (current version at FLA. STAT. § 447.203(2) (1977)).

57. FLA. STAT. § 447.307(4) (1977).

58. *Id.* § 447.307(4)(a).

59. *Id.* § 447.307(4)(b).

60. *Id.* § 447.307(4)(e).

61. *Id.* § 447.203(2).

62. *Id.*

63. *Id.* § 447.307(4)(d); *cf. id.* § 447.309(1) (requiring the chief executive of the public employer to negotiate the contract and recommend approval to the legislative body).

board.⁶⁴ In other states, the public employer for all state workers, including university faculty, is simply designated as "the State."⁶⁵ With the advice of the state agency the Governor's designee negotiates on behalf of "the State," and thus on behalf of the state university system.⁶⁶ Some states, such as New York, have created a special office of employee relations to negotiate statewide contracts and oversee their administration.⁶⁷ The head of the office is directly responsible to the Governor.

While some states provide for collective bargaining to be done outside the university, it was uncommon before the passage of collective bargaining statutes for state bureaucracies to become directly involved in such faculty-university relations. Consequently, control over faculties is typically vested in autonomous governing boards. In some states, the autonomy of the university is even guaranteed by the state constitution—thus assuring further independence from the executive.⁶⁸

The Florida approach of placing control over faculty collective bargaining in the Board of Regents as the "public employer" is consistent with the long-accepted national practice of delegating responsibility for academic employment relations to the separate governing body of the university. Such bodies are somewhat insulated from political pressures because of staggered terms. They provide a buffer between the political and academic spheres. The Florida approach seems sensible, given the potential range of negotiable subjects involved in faculty collective bargaining—such matters as tenure, sabbaticals, interfacing collective bargaining with university governance, consultation procedures with academic officers, and faculty evaluation.⁶⁹

64. ALASKA STAT. § 23.40.250 (1975); ME. REV. STAT. tit. 26, § 1022 (Cum. Supp. 1977-1978); MASS. GEN. LAWS ANN. ch. 150E, § 1 (West Cum. Supp. 1978-1979); MINN. STAT. ANN. § 179.63 (West Supp. 1978); MONT. REV. CODES ANN. § 59-1602 (Cum. Supp. 1977); N.H. REV. STAT. ANN. § 273-A:1 (1975); PA. STAT. ANN. tit. 43, § 1101.301 (Purdon Supp. 1978-1979).

65. DEL. CODE tit. 19, § 1301 (1965); NEB. REV. STAT. § 48-801 (1974); N.J. STAT. ANN. § 34:13A-3 (West Supp. 1977-1978), construed in Association of N.J. State College Faculties, Inc. v. Board of Higher Educ., 270 A.2d 744 (1970); WIS. STAT. ANN. § 111.81(16) (West 1974). For a detailed analysis of the problem of university systems, see McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determinations*, 1 WIS. L. REV. 55 (1971).

66. R.I. GEN. LAWS § 36-11-1 (Cum. Supp. 1977); N.J. STAT. ANN. § 34:13A-3 (West 1974); WIS. STAT. ANN. § 111.81(16) (West 1974).

67. N.Y. EXEC. LAW art. 24, § 650 (McKinney 1972).

68. M. MOOS & F. ROURKE, *THE CAMPUS AND THE STATE* 17-42 (1959); e.g., CAL. CONST. art. IX, § 9; MICH. CONST. art. VIII, § 3.

69. See McHugh, *supra* note 65, at 70-73. See generally *COLLECTIVE BARGAINING IN HIGHER EDUCATION—THE DEVELOPING LAW* (J. Vladeck & S. Vladeck ed. 1975). See also contract between Board of Regents of the State University System of Florida and United Faculty of Florida (1976-1978) (on file with Board of Regents, Tallahassee, Florida).

b. "Public Employee"

"Public employee" is broadly defined in PERA as any person employed by a public employer.⁷⁰ This definition is crucial because only a public employee has rights under PERA. Those excepted from the definition and therefore from PERA are those holding appointment by the Governor, elected officials, agency heads, members of boards or commissions, persons in the organized state militia, negotiators representing employers, and, under a 1976 amendment, persons employed by the legislature and prisoners confined in state institutions.⁷¹

Also excepted are those employees designated by PERC as managerial or confidential either upon application of the public employer to PERC or because of a unit determination or approval.⁷² Thus, managerial or confidential employees are not covered by the Act and may not organize or bargain collectively. The managerial definitional section has generated some significant decisions relating to its application and the treatment of supervisory employees' rights under PERA. These matters will be discussed later.⁷³

c. "Chief Executive Officer" and "Legislative Body"

For the state in its capacity as employer, "chief executive officer" is defined as the Governor.⁷⁴ For other public employers, the "chief executive officer" is that person, whether elected or appointed, who is "responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer."⁷⁵ This definition is significant because PERA places negotiating responsibility on the shoulders of the chief executive or "his representative."⁷⁶ This includes responsibility for keeping the legislative body informed, representing its views in collective bargaining

70. FLA. STAT. § 447.203(3) (1977).

71. Act of May 30, 1974, ch. 74-100, § 2, 1974 Fla. Laws 134, as amended by Act of May 31, 1976, ch. 76-39, § 2, 1976 Fla. Laws 75 (codified at FLA. STAT. § 447.203(3) (1977)). See also *Murphy v. Mack*, No. 51,025 (Fla. March 2, 1978), in which the Florida Supreme Court held that a sheriff is a "public employer" within the definition of PERA, but that a deputy sheriff is not a "public employee" within the meaning of the Act. The decision on the status of the deputy sheriffs emphasized the fact that they hold office by appointment, rather than employment, and are invested with the same sovereign power as the sheriff. The holding affirmed the holding of the First District Court of Appeal as to the sheriff's status as employer, but rejected its ruling that deputies were public employees for purposes of collective bargaining.

72. FLA. STAT. § 447.203(3) (1977). See also *id.* §§ 447.203(4)-(5), .307.

73. See text accompanying notes 124-67 *infra*.

74. FLA. STAT. § 447.203(9) (1977).

75. *Id.*

76. *Id.* § 447.309(1).

negotiations, and monitoring budgetary requests related to collective bargaining contracts.⁷⁷ In the event of an impasse, it also includes presentation of factfinding neutrals' reports to the legislative body, along with the chief executive's recommendations.⁷⁸

In practice, the following officials are deemed chief executives of their bargaining units: county school superintendent; community college president; chancellor of the university system (rather than a campus college president); county executive (whether appointed or elected); and city manager or mayor. A person may be appointed as chief executive for bargaining purposes in a small, local government which has no chief executive as such.⁷⁹

"Legislative body" is defined by PERA as the state legislature, a board of county commissioners, a district school board, a governing body of a municipality such as a city commission or council, or "the governing body of an instrumentality . . . having authority to appropriate funds and establish policy governing the terms and conditions of employment"⁸⁰ Thus, the legislative body is the entity which (1) funds in whole or in part the collective bargaining contract on behalf of the employer or (2) makes the final decision, after conducting a public hearing, with respect to contract impasse by either rejecting or accepting in whole or in part the recommendations of the public employer or the factfinder and taking "such action as it deems to be in the public interest"⁸¹ There are relatively few problems with this definition. The problems raised generally result from larger considerations relating to impasse resolutions.

As previously noted, PERA places the responsibility for actual negotiation in the chief executive, the responsibility for ratification in the public employer, and final authority for funding contracts and resolving impasses in the legislative body. This is generally consistent with the theoretical and traditional division of executive and legislative authority characteristic of the democratic political process.⁸² Moreover, the collective bargaining process as a system of

77. *Id.* § 447.309(2).

78. *Id.* § 447.403(4)(a).

79. It should be noted that the chief executive officer generally does not function as chief negotiator, but rather appoints his representative to work out the actual details of the agreement with the union. There should be ample communications between the chief negotiator, the chief executive officer, and the legislative body.

80. FLA. STAT. § 447.203(10) (1977).

81. *Id.* §§ 447.309(2), .403(4)(d).

82. For a discussion of the implications of collective bargaining on the political process, see H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 21-30 (1971), in which the authors distinguish public from private sector collective bargaining by the fact that in the public sector: (a) there is less negotiation trade-off protection on a total package basis since

resolving disputes depends in part on mutual acceptance of third party intervention as a means of encouraging or forcing resolution of disputes.

There is logic, therefore, in defining separately the executive and legislative bodies and assigning to them different responsibilities in the bargaining process. However, at the local government level, for example, the school board typically combines both legislative and executive functions. By statutory definition, the school board is the public employer responsible for sending its chief executive to negotiate a collective bargaining contract on its behalf in an adversary setting. Presumably, this means seeking to protect the school board's executive and managerial objectives as a public employer. Yet, once a contract impasse occurs, the school board must put on its legislative hat because it is also the legislative body. It must depart from its adversary role and suddenly become neutral.⁸³

Thus, the school board is placed in the awkward position of adjudicating disputes as legislative body to which it is a party in interest as public employer. The fulfillment of the statutory responsibility to be impartial becomes very difficult in cases of acrimonious contract disputes where the sides have polarized and waged political war through the news media. In such situations, public hearings on the factfinder's report conducted by the school board as a legislative body are not at all likely to instill public or parental confidence in the educational enterprise. Teachers' unions cry "unfair," arguing that they have been denied true collective bargaining and are actually relegated to "collective begging."⁸⁴ In such a context, it is difficult to disagree with them.

Another problem arises when the chief executive is an elected official rather than one appointed by the legislative body. This is the case in most Florida school districts. Potential conflict between

negotiation issues tend to be viewed in isolation in political terms; (b) parties are dealing with a service rather than a product; (c) professional employees view themselves as change agents and hence are seeking to negotiate public policy matters; (d) other interest groups are put at competitive disadvantage as against the unions which can bargain collectively; (e) strikes place pressure on elected officials to make expedient settlements without due deliberation in the state legislative process.

But see Wollett, "The Bargaining Process in the Public Sector: What is Bargainable?", 51 ORE. L. REV. 177 (1971). The author's thesis is that: (a) teachers do not use collective bargaining to promote social change; (b) the problem-solving approach to table negotiations is of primary importance; and (c) public employers should avoid conceptual concerns over sovereign authority and seek to resolve the problems of their employees.

83. FLA. STAT. §§ 447.203(10), .403(4) (1977). For an example of the difficulty occasioned by this dual role of the school board, see Madison County Educ. Ass'n, 4 F.P.E.R. ¶ 4006, at 16-17 (PERC 1977).

84. "Collective begging" is a phrase commonly used by labor unions to describe employment-related statutes which give little power to the unions.

the two may become a problem during contract negotiations. For example, one of the parties may identify its political interest with union support. Or the union may exacerbate an existing political or personality schism between the elected school board members and the elected school superintendent. Or the chief executive may be reluctant to embroil himself publicly in a collective bargaining contract dispute and may seek instead to shift public focus to the school board by encouraging a contract impasse which the board will have to resolve.

In other cases, the union may seek an impasse in the belief that it can receive more from a sympathetic school board sitting as a legislative body than from an unsympathetic school superintendent as negotiator. There are no easy solutions to such dilemmas. Removing the legislative body from impasse resolution requires some alternative form of impasse resolution. Conceivably, this might take the form of binding interest arbitration. Or it might require allowing the union the right to strike as is authorized in the private sector. But neither of these alternatives is likely to become available to employees in Florida in the foreseeable future.⁸⁵

Some of these problems could be avoided at the local level by making elected officials appointed. Appointed chief executives at the local government level are more likely to reflect the views of the employer and legislative body because their allegiance is to their appointers rather than to the voters. They are more professional and less political, generally, than are elected officials. Undoubtedly, they would lend a greater degree of expertise and stability to the bargaining relationship between the school board and the teachers' union because they could not be voted out of office.

The community colleges present a more complicated problem in terms of deciding whether or not the college trustees constitute the legislative body. Prior to the 1977 amendments, a literal reading of the definition of "legislative body" contained in PERA supported the view that the legislative body for all community colleges was the state legislature.⁸⁶ We have already seen that contract impasses

85. The Constitution Revision Commission has proposed the elimination of interest arbitration as an impasse resolution procedure. This restriction on the possible methods of settling disputes is detrimental to the smooth operation of the collective bargaining process. It would hamstring future legislative use of some types of binding arbitration in contract impasses. Presently the Florida Constitution, art. I, § 6, makes public employee strikes illegal.

86. 'Legislative body' means the state legislature, the board of county commissioners, the district school board, the governing body of a municipality, or the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment and which, as the case may be, is the appropriate legislative body for the bargaining unit.

between public employers and employee unions are ultimately resolved by the government's legislative body after a public hearing. It would, however, be administratively untenable and inconsistent with traditional state and local government relations to give more than thirty community colleges an opportunity to have the state legislature resolve local contract disputes after complex and lengthy public hearings.

Instead, the community college trustees have in fact uniformly assumed a dual role as both legislative body and public employer. PERA was amended in 1977 to resolve any question on the matter.⁸⁷ As in the case of school boards, the community college trustees now are defined by law as both the public employer and the legislative body.⁸⁸ The essential problem remains, however: the colleges are funded at the state level while many of the terms and conditions of employment are vested in each local governing board of trustees.

Within the university system, negotiations are conducted by the representatives of the chancellor, as chief executive, and the contract is ratified by the Board of Regents as public employer. The legislative body is, of course, the state legislature. It is hard to imagine how these definitional sections could be substantially altered. If problems previously mentioned become large enough to warrant amendment, negotiation and impasse procedures would also have to be altered.

C. Unit Determinations

1. Defining Bargaining Units

Before the bargaining process can begin, it is necessary to determine an appropriate bargaining unit.⁸⁹ Reduced to its simplest terms, this means identifying the parties to the collective bargaining process.

With respect to the employee unit, this is largely a matter of identifying a group of employees who share a community of interest with respect to terms and conditions of employment. However, other statutory unit criteria must also be satisfied. Once the appro-

Act of May 30, 1974, ch. 74-100, § 3, 1974 Fla. Laws 134 (current version at FLA. STAT. § 447.203(g) (1977)).

87. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(10) (1977)).

88. FLA. STAT. § 447.203(2) (1977) (trustees as public employer); *id.* § 447.203(10) (trustees as legislative body).

89. The materials in the introductory section on unit determination are generally excerpted from McHugh, *supra* note 65, at 56-63. For an enlightening discussion of the unit fragmentation problem, see Mack, *Public Sector Collective Bargaining: Diffusion of Managerial Structure and Fragmentation of Bargaining Units*, 2 FLA. ST. U.L. REV. 281 (1974).

priate group is identified, its members are entitled, often through a secret ballot election, to reject the bargaining process completely or to elect a bargaining agent who will represent them exclusively and negotiate "terms and conditions of employment" in their behalf.

For the employer, defining a unit means identifying "management." The identification of management and managerial authority is critical in public employment—particularly in higher education. Defining a bargaining unit requires a determination of the appropriate level at which a bargaining commitment may be made. The employer must have authority to make an effective recommendation. It is fundamental that the public employer have sufficient authority to negotiate on matters relating to the terms and conditions of employment.

How, then, is a unit determination made? There are two typical ways: by recognition or by certification. The employer may recognize an organization or union as the exclusive bargaining representative for all employees in the bargaining unit. In such a case, the parties have agreed to the unit configuration and to the majority status of the bargaining agent. On the other hand, the employer may refuse recognition, or recognition may be challenged by a competing organization. Then, a formal representation hearing may be initiated before an employee relations board which has statutory authority to make unit determinations. Usually these boards have wide discretion and may authorize and direct a representation election by secret ballot in order to assure that the bargaining agent is the choice of a majority of the employees.⁹⁰ The labor board then certifies the winner. Thus, recognition is voluntary, while certification results from labor board action.

What factors are considered in making unit determinations? The "appropriate" bargaining unit is at best an elusive concept. Therefore, while labor boards tend to develop certain working principles, they resist hard and fast rules. Criteria for establishing an appropriate unit are developed in part on a case-by-case basis. Unit determination precedents developed under federal legislation by the National Labor Relations Board (NLRB) are not binding on state boards. But such boards frequently look to NLRB decisions for guidance. Thus, the community-of-interest principle recognized at the federal level is also recognized and followed in many states.⁹¹

The labor board of any state is bound by the criteria for unit determination established by that state's employee relations act. Many state public employee relations acts include rather detailed

90. See, e.g., N.Y. PUB. EMPL. REL. Bd. R.P. pt. 201.

91. See note 171 and accompanying text *infra*.

unit determination criteria. Such specification is necessary because of the diverse functional employee groups characteristic of public employment and the corresponding difficulty of identifying "management" and managerial authority in government.

Understanding unit determinations requires an understanding of the doctrine of exclusivity. Under this doctrine, one bargaining agent is recognized or certified as the exclusive spokesman for all the employees in a particular bargaining unit for purposes of collective bargaining. The doctrine of exclusivity is firmly embedded in American industrial labor relations and is widely accepted as well in public employment labor relations.⁹²

This doctrine does not necessarily preclude an employer from meeting and conferring with other groups—usually in the presence of the certified agent. Nor does it require that an employee be represented only by the recognized or certified bargaining agent in a grievance matter.⁹³ As a practical matter, though, the employer usually looks to the certified bargaining agent to establish collective and organizational relations and to ascertain collective opinions of those in the unit. Exclusivity gives the bargaining agent fundamental legal rights under both the negotiated agreement⁹⁴ and employment relations law.⁹⁵ Thus, organizations and associations which are neither recognized nor certified as bargaining agents have relatively little influence under the doctrine of exclusivity.

The exclusivity doctrine is intended to promote stable collective relationships between the employer and the bargaining agent. Exclusivity provides organizational security and status to the bargaining agent and minimizes the disruptive impact of dissident factions within the employee unit. Exclusivity also protects the certified agent from other organizations created by and oriented toward the employer. Because the employer must deal with only one organization on matters concerning employees in the unit, a good argument may be made that exclusivity fosters cooperative employer-employee relationships. Exclusivity reinforces the notion of collectivism—and the bargaining power it brings to the table—which is at the heart of collective bargaining. Exclusivity strengthens the

92. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970).

93. *Id.*

94. See CITY UNIVERSITY OF NEW YORK, AGREEMENT BETWEEN THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK AND UNITED FEDERATION OF COLLEGE TEACHERS LOCAL 1460, AFL-CIO (1969); CITY UNIVERSITY OF NEW YORK, AGREEMENT BETWEEN THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK AND THE LEGISLATIVE CONFERENCE (1969).

95. National Labor Relations Act § 9(a) 29 U.S.C. § 159(a) (1970).

union, which ultimately gives the individual worker his leverage against the employer.

Another factor in determining an appropriate bargaining unit in the public sector is that of fragmentation—the problem of large versus small employee units.⁹⁶ The size and composition of the bargaining unit is often decisive in determining which organization will win recognition or certification. For example, though a union might succeed in organizing one employee group at a large governmental institution (e.g., a state hospital) and petition successfully for certification based on its organization of that one employee unit, that union might stand little or no chance of winning recognition or certification if all employees at the institution were included in the bargaining unit.

It is also clear that in the public sector the nature of the bargaining unit dictates to a great extent the scope of bargainable issues. This is less true in private business where the authority to bargain on all issues is usually centralized or can be easily delegated.⁹⁷ In determining an appropriate unit in the public sector, however, it is essential to consider the subject matter to be bargained for, that is, the scope of negotiation.⁹⁸

In the public sector, authority is likely to be vested at higher employer levels. This is especially true of state governments. As a result, larger employee units are needed.⁹⁹ Recent experience suggests that in the public sector “[f]ragmentation into too many small units can severely limit the scope of bargaining subject matter, and that in turn might defeat the basic bargaining right.”¹⁰⁰ Proliferation of employee units also tends to promote excessive competition among rival organizations. This produces “whipsawing” in which employees cite gains at one institution as the minimum concessions acceptable in later negotiations at another institution.

Arguments in favor of smaller units generally emphasize the need for self-determination and the greater sensitivity of like-situated employees to mutual needs. There is often an underlying suspicion that the employer wants a large unit in order to frustrate employee organizational activities, thereby discouraging bargaining.

However, there are a number of practical advantages to the larger unit. A large bargaining unit is more likely to be able to afford to

96. For an excellent treatment of the problem of fragmentation in public employment, see Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969).

97. *Id.* at 1006.

98. *Id.*

99. For further discussion of the pros and cons of this position, see *id.* at 1005-08.

100. *Id.* at 1013.

engage experienced staff and professional advisors in negotiation and in matters of contract administration. The agent of the larger unit will have a broader power base. And opinions of large groups are more likely to reflect those of the total employee population. From the employer's point of view, there are fewer groups with which to deal.

The bargaining agent for a larger unit must assume greater responsibility for the divergent interest groups within the unit.¹⁰¹ On the other hand, unions representing small units are less likely to be concerned with larger institutional problems.

2. *Florida's Statutory Procedures for Recognition and Certification*

In Florida, PERC is responsible for approving bargaining units when the parties agree and for defining an appropriate bargaining unit when the parties do not agree.¹⁰² When the parties agree on a unit, PERC may not change the unit without first conducting a representation proceeding. This gives all parties an opportunity to present evidence and explain their positions.¹⁰³ The First District Court of Appeal has held that PERC may not "enlarge, reduce or redefine a bargaining unit which has been agreed upon by an employee organization and the public employer."¹⁰⁴ PERC may, however, disapprove such a unit altogether. If this happens, the objecting party may file a petition for certification with the commission and offer proof of its position.¹⁰⁵

Based on these principles, there are three alternatives for defining a unit and obtaining certification under PERA. First, the employee organization may request voluntary recognition by the employer.¹⁰⁶ If the employer agrees to the majority status of the employee organization and to the appropriateness of the unit, PERC then must either approve or disapprove the unit. PERC is expressly prohibited by PERA from questioning the majority status of the employee organization once it has been recognized by the employer.¹⁰⁷ If PERC approves the unit, the employee organization is certified as the exclusive representative for purposes of collective bargaining.

101. J. HALLIHAN & W. HEISEL, *QUESTIONS & ANSWERS ON PUBLIC EMPLOYEE NEGOTIATION* 17-18 (1967).

102. FLA. STAT. § 447.307(1)(a), (3)(a)(1) (1977).

103. *Id.* § 447.307(1)(a)-(b).

104. *School Bd. v. PERC*, 330 So. 2d 770, 773 (Fla. 1st Dist. Ct. App. 1976) (Marion County); FLA. STAT. § 447.307(1)(a)-(b) (1977).

105. FLA. STAT. § 447.307(2) (1977).

106. *Id.* § 447.307(1)(a).

107. *Id.*

Second, where voluntary recognition is not possible but there nevertheless is agreement on the unit, the parties may, subject to approval by PERC, hold a consent election.¹⁰⁸ PERC or some other acceptable party may supervise the election. A majority of votes cast will be needed to designate a bargaining agent.

Third, when the employer refuses recognition or objects to the unit, or when a proposed unit is disapproved by PERC, or when the petitioner chooses not to request recognition, a party may petition for certification.¹⁰⁹ This petition must be accompanied by dated statements signed by at least thirty percent of the employees in the proposed unit, indicating a desire to be represented by the petitioner.¹¹⁰ In contested unit cases, a hearing is then held by a PERC hearing officer who makes a finding of fact and recommendations. The full commission reviews the hearing officer's report and renders a decision defining the unit and ordering an election.¹¹¹ This election order is not considered final agency action from which a petition for judicial review could be filed challenging the order.¹¹² However, the Second District Court of Appeal has held that once PERC certifies an employee organization after an election, certification constitutes final agency action and therefore is subject to judicial review.¹¹³

The Florida Supreme Court has held that the Florida Public Records Act allows a public employer to examine the authorization cards which are submitted by a union upon petition for certification as a bargaining agent.¹¹⁴ In *School Board v. PERC*, a schoolteachers' union filed a petition with PERC for certification as bargaining agent for certain employees of the school board. The school board maintained that the petition was not supported by thirty percent or more of the employees in the unit, as required by statute, and requested access to the authorization cards. PERC refused access "because of the need for employee confidentiality in representation matters."¹¹⁵ PERC argued that it alone could determine whether

108. FLA. DEP'T COM. PERC R. § 8H-2.01.

109. FLA. STAT. § 447.307(2) (1977). See also *School Bd. v. Florida Pub. Employees Relations Comm'n*, 3 F.P.E.R. 30 (Fla. 1st Dist. Ct. App. 1977) (Marion County), in which the First District Court of Appeal held that an employee organization that can show at least 30% representation in a proposed unit may file a certification petition with PERC without first requesting recognition by the public employer.

110. *Id.*

111. *Id.* § 447.307(3)(a)(1), (3).

112. *School Bd. v. PERC*, 333 So. 2d 95 (Fla. 2d Dist. Ct. App. 1976) (Sarasota County); FLA. STAT. § 120.68 (1977).

113. *Id.*

114. *School Bd. v. PERC*, 334 So. 2d 582 (Fla. 1976) (Marion County).

115. *Id.* at 583.

there was a sufficient showing of interest to allow examination of the cards.

The school board sought a writ of mandamus requiring PERC to provide access to the cards. The school board argued that section 447.307(2) of PERA and section 119.01 of the Public Records Act¹¹⁶ gave employers an "absolute right to review authorization cards."¹¹⁷ Section 447.307(2) provides in relevant part: "Any employee, employer or employee organization having sufficient reason to believe any of the employee signatures were obtained by collusion, coercion, intimidation, or misrepresentation or are otherwise invalid shall be given a reasonable opportunity to verify and challenge the signatures appearing on the petition."

PERC contended that authorization cards may be reviewed only where PERC finds factual proof of invalidity. Relying on labor policies developed under the National Labor Relations Act¹¹⁸ and the public employee relations statutes of other states,¹¹⁹ PERC stressed that disclosure might enable employers to make reprisals and thus "chill" the exercise of collective bargaining rights.¹²⁰ In addition, PERC contended that since collective bargaining rights of employees are guaranteed by the Florida Constitution, they operate in an area which is exempt from the Public Records Act.¹²¹

The court rejected PERC's argument. The court emphasized that section 447.307(2)-(3) of PERA gives the public employer the right to "verify and challenge the signatures" on the authorization cards if there is "sufficient reason to believe" that the signatures are invalid or were improperly obtained.¹²² The court observed that on the one hand a challenge on the grounds of invalidity is meaningless if the employer must wait until a hearing, while on the other hand any abuse of the right of access to the authorization cards could be

116. FLA. STAT. ch. 119 (1977).

117. 334 So. 2d at 583. Section 119.01 provided simply that: "It is the policy of this state that all state, county, and municipal records shall be all times be open for personal inspection by any person."

118. 29 U.S.C. §§ 151-59 (1970).

119. See notes 64-66 and accompanying text *supra*.

120. See S.H. Kress, 137 N.L.R.B. 1244 (1962). PERC also received advisory letters supporting its position from public employee relations boards in Hawaii, Michigan, New Jersey, New York, Oregon, and Wisconsin.

In its brief, PERC described the "chilling effect" as follows:

If an employee knows at the inception of the organizational campaign that his name and desires for collective representation will be exposed to public scrutiny, public ridicule, or more basic, reprisal from an employer, he may choose to forego or curtail the exercise of his constitutional right rather than submit to such pressures. 334 So. 2d at 583 n.3.

121. *Id.*

122. *Id.* at 584.

remedied through the unfair labor practices sections of PERA.¹²³ The court in dicta noted that "bargaining orders may provide a full remedy," and observed in a footnote that the courts are available to enforce constitutional rights.^{123.1}

3. *Managerial Employees and Supervisory Unionism*

The definitional section of PERA dealing with managerial employees is critical because employees designated "managerial" are excluded from statutory coverage. "Managerial employees" are those who perform jobs which are not of a routine clerical or ministerial nature but which instead require the exercise of independent judgment. Whether independent judgment is needed to do a job is indicated by the presence of one of the following: (1) formulating or assisting in the formation of policy applicable to employees in the bargaining unit; (2) assisting in preparation and conduct of collective bargaining negotiations; (3) having a role in contract administration; (4) having a significant role in personnel administration or in employee relations; or (5) having a significant role in making or administering a budget.¹²⁴

In 1976, this provision was amended¹²⁵ to include certain school administrator titles enumerated in section 228.041(10) of the Florida Statutes,¹²⁶ including superintendents, supervisors, principals, and professional administrative assistants to principals and superintendents. The practical result of the 1976 amendment is to preclude unionization of professional supervisory personnel in the school districts. The 1977 amendments excluded police chiefs, fire chiefs, and directors of public safety departments as well.¹²⁷ In addition, the 1977 amendments provided that "other" firefighters and police officers may be determined by PERC to be managerial.¹²⁸ According to this latest amendment, PERC "shall consider . . . the paramilitary organizational structure of the department involved."¹²⁹

House Bill 2028, which formed the basis of PERA, permitted

123. *Id.* at 584-85.

123.1. *Id.* at 585 & n.11 (citing with approval *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

124. FLA. STAT. § 447.203(4) (1977).

125. Act of June 22, 1976, ch. 76-214, § 1, 1976 Fla. Laws 390 (codified at FLA. STAT. § 447.203(4)(a)(6) (1977)).

126. (1977).

127. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(4)(b) (1977)).

128. *Id.*

129. *Id.*

supervisory employees to unionize.¹³⁰ So did its forerunner, House Bill 3314.¹³¹ Proposed amendments to House Bill 2028, drafted by the author, eliminated the right of supervisors to organize by excluding them from PERA and by defining supervisory employees as one category of managerial employees. The exclusionary language tracked the definition of "supervisor" in section 2(11) of the National Labor Relations Act.¹³² Other references to the words "supervisor" and "supervisory" were also struck from PERA.

At an informal conference attended by the author, the firefighters objected to excluding supervisors under the proposed amendment. Representatives of the school principals, interested in preserving the right of principals to organize, also objected. Consequently, supervisory groups were not classified as "managerial" when the exclusionary amendments were introduced in the 1977 legislative session. The result is curious indeed. PERA is totally silent on the issue of supervisory unionism; the word "supervisor" appears nowhere in the statute. However, PERC recognized the problem early after passage of PERA. Its own regulations compel PERC to consider "the presence of possible conflict of interest of employees in the proposed unit"¹³³ when determining an appropriate bargaining unit.

PERA's silence on supervisory unionism has caused some confusion. No court decisions have faced squarely the issue of whether supervisors can or cannot unionize. But the clear indication of the PERC decisions dealing with school personnel is that they can.¹³⁴ Curiously, in defining the state worker units by rule,¹³⁵ PERC created a statewide unit of supervisory employees.¹³⁶ Accordingly, both the state (as employer and party to the rulemaking procedure) and

130. Fla. (1973).

131. Fla. (1972).

132. 29 U.S.C. § 152(11) (1970). The Act defines supervisor as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

133. FLA. DEP'T COM. PERC R. §8H-3.31.

134. Seminole Educ. Ass'n, No. 8H-RA-754-1001 (Fla. PERC Sept. 17, 1975); Marion Educ. Ass'n., 1 F.P.E.R. 28 (PERC 1975). There is no court decision on the constitutionality of the 1976 amendment excluding principals and other school supervisory personnel from PERA coverage as being managerial. Such exclusion may deprive certain employees of the right to bargain collectively granted by art. I, § 6 of the Florida Constitution where in fact such employees are supervisory and not managerial.

135. See notes 214-15 and accompanying text *infra*.

136. State of Fla., 2 F.P.E.R. 166 (PERC 1976).

PERC have accepted the right of supervisory employees to bargain collectively in Florida. The rationale is that "public employee" is broadly defined by PERA, and thus absent express exclusionary language, supervisory employees should have bargaining rights. Furthermore, the definitional section excluding employees as management is not broad enough to exclude all supervisory employees where constitutional rights are at stake.¹³⁷

Often the problem of supervisory unionism is partially resolved because the parties agree initially to exclude many high-level supervisory positions. Examples are the department chairpersons in the State University System¹³⁸ and division chairpersons in the community colleges.¹³⁹ There is a trend toward stipulating supervisory positions into the employee unit where the supervisory role is somewhat limited or stipulating them out of the unit and dubbing them "managerial" where they perform a less substantial supervisory role.¹⁴⁰

Thus, supervisors are excluded as management whenever they help formulate policy or perform "a significant role in personnel administration or employee relations."¹⁴¹ For practical purposes, this was done in the State University System case with respect to certain department chairpersons by stipulation of the parties at the unit determination stage. Recall that, with PERC approval, stipulation as to the appropriateness of the unit, including managerial exclusions, is permitted under PERA.¹⁴²

Despite this approach, there may be a residuary group of employees which does not fall into either class. For example, a union might want the group excluded from the employee unit for reasons of expediency: in a consent election case, their vote may be questionable; or some members of this residuary group might even perceive themselves as part of "management." This could present a conflict of interest due to incidental supervisory responsibilities. On the other hand, the residuary group may be so small in number as to be insignificant. In situations where the employer wants the group excluded as managerial but the union is unwilling to so stipulate, and the PERC investigation officer is reluctant to exclude them,

137. See notes 232-42 and accompanying text *infra*.

138. See State Univ. Sys. Bd. of Regents, 3 F.P.E.R. 39 (PERC 1977). Technically, certain department chairmen were not stipulated out as management, but were merely excluded with no reason given.

139. *Id.* at 40.

140. *Id.*

141. FLA. STAT. § 447.203(4)(a)(4) (1977).

142. *Id.* § 447.307(1)-(2).

they may be excluded as possible supervisory employees. This might typically occur when management is unwilling to oppose exclusion because litigation would delay a desired consent election, or because the residuary group is not viewed as likely to pose the threat of unionized supervisors, or the cost of litigating is prohibitive. The result is to leave a small group of employees out of the unit although they are not designated managerial employees. This group might later be unionized as a separate supervisory unit.¹⁴³

Florida's position on managerial exclusions is curiously ambivalent. Two early PERC decisions moved toward a narrow construction of the management exclusion section. In *Seminole Education Association*, PERC held that principals and assistant principals were not management.¹⁴⁴ PERC concluded that mere policy "input" by school principals, though actively solicited by the superintendent, was not enough to make the positions managerial. PERC noted that principals do not "possess authority independent of the superintendent" ¹⁴⁵ Thus, the principals and assistant principals could not be said to "[f]ormulate . . . polic[y] . . . applic-

143. The uniform services (police and firefighters) are examples of the interplay between managerial and supervisory exclusion. See *Northwest Fla. Police Benevolent Ass'n*, 2 F.P.E.R. 8 (PERC 1976). In *Northwest Fla. Police Benevolent Ass'n*, PERC approved a police unit which included sergeants, since they had relatively few supervisory responsibilities, but excluded lieutenants, since they exercised a sufficiently high level of supervision to represent a conflict of interest with the larger employee group. The lieutenants were not excluded as managerial but became a residual supervisory group. Another case in the police setting, soon to be heard by PERC, may test further the extent of PERC's willingness to exclude lower level supervisory positions from employee bargaining units. *Polk County PBA*, No. 8H-RC-766-2128 (Fla. PERC, Hearing Officer's Report Apr. 12, 1977). The parties in *Polk* stipulated that lieutenants should be excluded on the basis of a conflict of interest—apparently excluding them as supervisors. *Id.* at 3. This left unresolved the issue of the appropriateness of a unit which includes both sergeants and rank-and-file policemen. The employer contended that sergeants are managerial and stressed the fact that the sergeants work closely with the lieutenants in evaluating patrolmen, administer nominal discipline, and provide budget information. *Id.* at 6. PERC then ordered an election on a proposed unit including sergeants. *Id.* at Order No. 78E-085 (Mar. 15, 1978). PERC found that the sergeant's "supervisory authority . . . is minimal." *Id.* at 2. The election has not yet been held nor has a unit been certified.

In *International Ass'n of Firefighters, Local #2157*, 2 F.P.E.R. 11 (PERC 1976) (Gainesville), lieutenants were included in the general unit because they received similar fringe benefits, had no power over promotions and demotions, and had very closely circumscribed supervisory authority. In *Largo Professional Fire Fighters*, No. 2427, 2 F.P.E.R. 22 (PERC 1976), PERC allowed captains and lieutenants in the same unit with firefighters because they did not formulate policy, shared living quarters with other employees, and made only advisory disciplinary recommendations. The fire chief and his assistant were deemed managerial. *But cf.* *Professional Firefighters of Orlando, Local No. 1365*, 2 F.P.E.R. 40 (PERC 1976), in which PERC excluded captains from a firefighters' unit because they were the sole commanding officers on certain shifts and exercised broad authority.

144. No. 8H-RA-754-1001 (Fla. PERC Sept. 17, 1975) (Order No. 75C-89-119).

145. *Id.* at 2.

able to bargaining unit employees."¹⁴⁶

PERC observed too that, while principals prepared proposed budgets, they do so based on formulas determined by the superintendent and school board.¹⁴⁷ The only discretion a principal has in budget administration is that of allocating within a previously established budget figure.¹⁴⁸ PERC viewed this discretion as being additionally limited by countywide salary ranges. Further, this discretion, such as it is, is subject to review and approval by the superintendent or a budget committee composed of teachers, principals, and staff.¹⁴⁹ Thus, in PERC's view, the principals did not have a significant managerial role in the preparation and administration of budgets.¹⁵⁰

The statute also calls for the managerial exclusion from the employee bargaining unit of any employee who "assist[s] in the preparation for the conduct of collective bargaining negotiations."¹⁵¹ PERC, in *Seminole Education Association*, held that

[p]articipation in collective bargaining signifies more than expressing opinions regarding . . . [bargaining] . . . demands from an organization [i.e., Union] [P]articipation in collective bargaining connotes a physical presence at the bargaining table or occupying such a relationship to the negotiating process that the expression of an opinion will have a significant impact on the employer's labor relations policies. . . . [T]he statute requires active participation in the bargaining process.¹⁵²

The statute also compels the exclusion of any employee who plays a "major role in the administration of agreements" resulting from collective bargaining negotiations.¹⁵³ PERC held in *Seminole Education Association* that "[a]n employee plays a major role in contract administration if he or she is vested with the authority to

146. FLA. STAT. § 447.203(4)(a) (1977).

147. *Id.* Seminole Educ. Ass'n, No. 8H-RA-754-1001, slip op. at 3.

148. *Id.*

149. *Id.*

150. *Id.* at 5.

151. FLA. STAT. § 447.203(4)(a)(2) (1977).

152. Seminole Educ. Ass'n, No. 8H-RA-754-1001, slip op. at 5.

153. FLA. STAT. § 447.203(4) (1977). The managerial exclusionary provision in the original PERA used the word "major" in the administration of agreements phrase. Act of May 30, 1974, ch. 74-100, § 3, 1974 Fla. Laws 134 (current version at FLA. STAT. § 447.203(4)(a)(3) (1977)). The word "major" was apparently dropped from the conference committee bill passed by both houses when the bill was printed for statutory distribution. See Act of June 22, 1976, ch. 76-214, § 1, 1976 Fla. Laws 390 (amending FLA. STAT. § 447.203(4)(a)(3)(1975)). This apparent error was compounded in the 1977 conference committee bill which passed. Fla. SB 1449 (1977). Thus, "major" is omitted from the 1977 amendments. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476.

modify policies and procedures that have a significant impact on labor relations.”¹⁵⁴ Merely having authority to enforce observances of contract terms does not establish managerial status even though the individual participates in the first step of the grievance machinery.¹⁵⁵ PERC found that school principals do not exercise independent judgment in resolving initial grievances and held that principals are engaged in ministerial activities which do not constitute a major role in contract administration.¹⁵⁶ Thus, principals do not fall within the managerial exclusionary provision of section 447.203(4)(a)(3) of the Florida Statutes.¹⁵⁷

In *Marion Education Association*,¹⁵⁸ PERC again dealt with the issue of whether school principals were a part of management. The commission followed basically the same approach it had used in *Seminole* and held that principals were at best supervisory.¹⁵⁹ “There is no evidence,” the commission observed,

that any of the employees have directly participated in collective bargaining or that such employees may ever be required to assist the employer in negotiations with a certified organization. Furthermore, the evidence discloses that the supervisory function of many of the employees in the managerial application is at best minimal. The job descriptions provided by the employer disclose that the employees sought to be exempted, just as other certified teachers, are engaged almost exclusively in the process of educating students within the school district.¹⁶⁰

To the extent that the commission held in *Seminole* and *Marion* that school principals are not managerial employees, both cases were overruled by the 1976 amendment to section 447.203(4).¹⁶¹ The 1976 amendment specifically excluded school principals as management. Nevertheless, the two cases may still be significant in that they reflected a narrow construction of PERA’s managerial exclusionary provisions.

The extent to which *Seminole* and *Marion* still reflect PERC’s position on managerial exclusion is not clear. Both cases proceeded from an important premise: since article I, section 6 of the Florida

154. *Seminole Educ. Ass’n*, No. 8H-RA-754-1001, slip op. at 6.

155. *Id.*

156. *Id.*

157. (1977).

158. 1 F.P.E.R. 28 (PERC 1975).

159. *Id.* at 29.

160. *Id.*

161. Act of June 22, 1976, ch. 76-214, § 1, 1976 Fla. Laws 390 (codified at FLA. STAT. § 447.203(4)(a)(6) (1977)).

Constitution assures all public employees the right to engage in collective bargaining, a provision of PERA which seeks to divest such right should be narrowly construed. Therefore, "anyone asserting a claim of managerial status will have the burden of offering clear and convincing evidence that the standard criteria have been satisfied."¹⁶²

The narrow construction of managerial exclusions applied by PERC in *Seminole* and *Marion* is not yet settled law. A recent decision by the First District Court of Appeal cast some doubt on the commission's construction. In *Miami-Dade Community College District Board of Trustees*, the court held that department chairpersons and program coordinators in a community college are managerial employees as defined in PERA.¹⁶³ In a brief opinion, the court noted that chairpersons make recommendations on the hiring of new faculty members, prepare recommendations for promotions and salary raises for all departmental faculty members, determine the use of department travel funds, and have some responsibility for hiring support personnel.¹⁶⁴ The court concluded that the chairpersons fell within the management exclusion definitions of PERA because they clearly played a role in employee relations¹⁶⁵ and because the responsibilities of the chairpersons were neither routine nor ministerial.¹⁶⁶ Thus the court held that chairpersons should not be included within the employee bargaining unit of the community college.

Miami-Dade is significant because it invoked a broad interpretation of the management exclusion provision by excluding supervi-

162. 1 F.P.E.R. at 29.

163. 341 So. 2d 1054, 1056 (Fla. 1st Dist. Ct. App. 1977); cf. United Faculty Ass'n of St. Petersburg Junior College, FTP/NEA, 3 F.P.E.R. 80 (PERC 1977) (holding that directors of academic divisions are managerial employees who should be excluded from the employee bargaining unit).

164. 341 So. 2d at 1055-56.

165. *Id.* at 1056; FLA. STAT. § 447.203(4)(a)(5) (1977).

166. 341 So. 2d at 1055; FLA. STAT. § 447.203(4)(a)(5) (1977). The *Miami-Dade* decision suggests that Florida courts may pass quite readily on PERC's findings concerning unit definitions in the future. Normally, there is a general reluctance on the part of courts to second-guess unit determinations made by labor relations boards. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Sullivan v. Labor Relations Comm'n*, 364 N.E.2d 1099 (Mass. App. 1977). See also *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). However, it appears settled that, while a PERC order decreeing a representation election and specifying the unit is not a final order for purposes of securing judicial review, the actual certification of the unit following the election does constitute final agency action from which an appeal can be taken to the appropriate district court of appeal. *Panama City v. PERC*, 333 So. 2d 470 (Fla. 1st Dist. Ct. App. 1976); *School Board v. PERC*, 333 So. 2d 95 (Fla. 2d Dist. Ct. App. 1976) (Sarasota County). Thus, an unfair labor practice case is not an appropriate proceeding for a public employer to attack the appropriateness of the certified bargaining unit. *Pinellas County School Bd.*, 3 F.P.E.R. 158 (PERC 1977).

sory positions from an employee bargaining unit. The court clearly characterized high-level supervisory positions as management and pointed in explanation to their supervisory functions. Also noteworthy is the court's silence on the constitutional argument relied on by PERC in *Seminole* and *Marion*. In fact, the *Miami-Dade* court did not even cite these relevant PERC decisions.

In summary, resolution of disputes over managerial exclusions of supervisors will depend on the extent of supervisory responsibility in each particular case and the type of public employee group involved. The higher the level of supervisory responsibility and policy involvement, the greater the likelihood that PERC will designate the supervisory position as management. In unit cases where lower level supervisory positions cannot be excluded from the unit, PERC might nevertheless characterize the supervisory positions as management on the theory that to do otherwise would create a conflict of interest with most of the employees in the proposed unit. Such a decision would leave those supervisors free to claim their bargaining rights under PERA as a separate unit.¹⁶⁷

In practice, the matter of managerial exclusion is usually worked out on an ad hoc basis. This results in exclusion of supervisory titles as managerial in some cases but not in others. Sometimes no reason is given for excluding the supervisory positions from the employee unit. Typically this happens when the parties leave the issue to be decided at some future date following a consent election.

Florida's problems with managerial exclusions and supervisory unionism are understandable in view of the Florida statute. Those contemplating legislation in the field would do well to clarify such issues as: whether or not supervisory employees may bargain collectively; whether supervisory employees should be prohibited from inclusion in the same unit with those they supervise; whether supervisory employees may be represented by or affiliated with the same union which represents the employees they supervise; whether there should be a more precise statutory definition of managerial exclusions by specification of certain job titles or classifications; whether a more systematic scheme for such specification should be left to the

167. FLA. STAT. § 447.307(4)(h) (1977) requires PERC in unit determination cases to consider "[s]uch other factors and policies as the commission [PERC] may deem appropriate." FLA. DEP'T. COM. PERC R. § 8H-3.31 provides that PERC must consider "the presence of possible conflict of interest of employees in the proposed unit." There does not seem to be any serious question as to whether supervisory public employees may bargain collectively in Florida, although the issue has not been raised in a court of competent jurisdiction. See also United Faculty Ass'n of St. Petersburg Junior College, FTP/NEA, 3 F.P.E.R. 80 (PERC 1977), in which PERC excluded certain employees from the unit as supervisors rather than under the managerial/confidential designation.

labor board; whether the scope of negotiable subjects should be statutorily narrowed where supervisory employees negotiate with management in order to minimize conflict between the two. Rather than address such issues, lawmakers may choose to draw a rather broadly defined managerial exclusion provision which permits, on an ad hoc basis, exclusion of middle- and high-level supervisory employees from statutory coverage. This is the approach which has been followed in Florida.

4. *Statutory Criteria for Defining Bargaining Units*

As previously noted, the weight of authority in public sector labor relations is to define the largest feasible bargaining unit comensurate with reasonable employee community of interest and practical workability. The statutory criteria for unit definition in Florida's PERA reflect this bias toward large units:

- (a) The principles of efficient administration of government.
- (b) The number of employee organizations with which the employer might have to negotiate.
- (c) The compatibility of the unit with the joint responsibilities of the public employer and public employees to represent the public.
- (d) The power of government officials at the unit level to agree or make effective recommendations to another administrative authority or legislative body with respect to matters of employment upon which the employee desires to negotiate.
- (e) The organizational structure of the public employer.
- (f) Community of interest among the employees.
- (g) The statutory authority of the public employer to administer a classification and pay plan.
- (h) Such other factors and policies as the commission may deem appropriate. However, no unit shall be established or approved for purposes of collective bargaining which includes both professional and nonprofessional employees unless a majority of each group votes for inclusion in such a unit.¹⁶⁸

Items (c), (d), and (f) above are identical to New York's statutory criteria.¹⁶⁹ The interpretation and application of these criteria by the New York Public Employee Relations Board (PERB) and courts establish beyond question a pattern of favoring large and comprehensive units.¹⁷⁰

168. FLA. STAT. § 447.307(4) (1977); see Mack, *supra* note 89.

169. N.Y. CIV. SERV. LAW § 207 (McKinney Supp. 1969).

170. See Rock, *supra* note 96, at 1001-16. See also State of N.Y., 2 P.E.R.B. ¶ 4183 (N.Y. PERB 1969); New York State Thruway, 1 P.E.R.B. ¶ 4062 (N.Y. PERB 1968); State of N.Y.,

Under the single criterion of "community of interest," PERA identifies five key factors: the manner in which wages and other terms of employment are determined; the method by which jobs and salary classifications are determined; interdependence of jobs and interchange of employees; desires of the employees; and the history of employee relations within the organization of the public employer concerning organization and negotiation.¹⁷¹

5. *Defining State Worker Units*

a. *The State University System*

State worker bargaining units have been defined two ways in Florida: by PERC decision in the case of the university system and, more recently, by PERC rules with respect to other state workers.

The experience in the university system reveals the complexities of defining comprehensive public-sector bargaining units. The university system was the first state employer for which there was a unit determination proceeding in Florida. And the determination occurred at an early stage of PERA's development.

As previously noted,¹⁷² defining a bargaining unit in government raises substantial policy issues. These issues include the size of the employee group to be represented, the impact on the existing pay plan, the authority of specified public officials to administer the agency, and the scope of the negotiation. In the private sector, unit definition does not have quite such a pervasive impact on institutional policy as it has in the public sector. For example, employer authority is more defined and the functional diversity of the enterprise is less pronounced in the private sector, and greater numbers of jobs may be combined more readily to form a unit. Furthermore, there is no need to conform private units to civil service job classification and pay plans and other existing statutory schemes relating to terms and conditions of employment. Moreover, state worker units generally deal with more employees than do those routinely encountered in private business.¹⁷³

1 P.E.R.B. ¶ 3226 (N.Y. PERB 1968); *Malone Cent. School Dist.*, 1 P.E.R.B. ¶ 3150 (N.Y. PERB 1968).

171. FLA. STAT. § 447.307(4)(f) (1977); cf. National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1970) (criteria for unit determination by the NLRB): *See also* Olinkraft, Inc., 179 N.L.R.B. 61 (1969); *Kennecott Copper Corp.*, 176 N.L.R.B. 96 (1969); *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962); FLA. STAT. § 447.307(1)(b) (1977) (PERC shall approve unit as appropriate absent inclusion of prohibited category of employees when unit has been recognized by the public employer).

172. *See* Rock, *supra* note 96.

173. *Id.* *See also* McHugh, *supra* note 65, at 58-61.

What happened in Florida's university system illustrates these differences. Under state law, the Florida State University System (FSUS) includes nine universities on as many campuses and is governed by a Board of Regents (BOR) appointed by the Governor.¹⁷⁴ A statewide executive staff is headed by the chancellor of the system, who is appointed by the BOR.¹⁷⁵ College and university presidents administer the individual universities.¹⁷⁶

The United Faculty of Florida (UFF) filed a Petition for Certification on December 16, 1974, seeking to represent a unit composed of all faculty and professional employees of the state university system.¹⁷⁷ On December 19, 1974, the Florida Chapter of the American Association of University Professors (AAUP) filed a Motion to Intervene but did not describe what it deemed to be an appropriate unit.¹⁷⁸ The two law schools within the system—at Florida State University and the University of Florida—sought a separate comprehensive statewide unit of law professors through the FSUS Law Faculty Association (LFA).¹⁷⁹ Similarly, the Florida Engineering Faculty Association (FEFA) sought a unit of all engineering faculty in the university system.¹⁸⁰

In addition, a representation petition was filed by the University of Florida Health Center Faculty Association (HCFA).¹⁸¹ HCFA sought to represent certain employees associated with the J. Hillis Miller Health Center at the University of Florida campus in Gainesville. Finally, a petition seeking to represent extension agent employees of the Institute of Food and Agricultural Sciences (IFAS) at the University of Florida campus was filed by the IFAS Faculty Association (IFAS-FA).¹⁸² All these petitions were consolidated for a hearing by PERC.¹⁸³

174. FLA. STAT. § 240.001 (1977).

175. *Id.* § 240.0042(2)(c).

176. *Id.* § 240.042(2)(d).

177. United Faculty of Fla., No. 8H-RC-745-0002 (Fla. PERC, filed Dec. 16, 1974).

178. *Id.* (motion filed pursuant to FLA. AD. CODE R. 8H-3.05).

179. University of Fla. Law Faculty Ass'n, No. 8H-RC-754-0032 (Fla. PERC, filed Jan. 3, 1976); Florida State Univ. Law School Ass'n, No. 8H-RC-755-0003 (Fla. PERC, filed Jan. 28, 1975).

180. University of Fla. Eng'r Faculty Ass'n, No. 8H-RC-755-0006 (Fla. PERC, filed Jan. 29, 1975).

181. University of Fla. Health Center Faculty Ass'n, No. 8H-RC-755-0008 (Fla. PERC, filed Jan. 28, 1975).

182. IFAS Faculty Ass'n, No. 8H-RC-755-0004 (Fla. PERC, filed Jan. 29, 1975).

183. PERC held representation hearings in March, April, and May (a total of about 17 days) to take evidence on the unit issues. On November 21, 1975, the hearing officer issued his report recommending an appropriate unit for the FSUS. State Univ. Sys. Bd. of Regents 3 F.P.E.R. 39 (PERC 1977).

After receiving briefs and hearing all testimony,¹⁸⁴ PERC defined four bargaining units for the Florida State University System:

184. The petitions cited in notes 177-82 *supra* were consolidated in State Univ. Sys. Bd. of Regents, 3 F.P.E.R. 39 (PERC 1977). At the hearings, considerable testimony was presented to show why these particular bargaining units were appropriate. That testimony is summarized here as an indication of evidence which PERC found persuasive.

The LFA presented testimony that emphasized the following factors to show that the law schools' faculty did not share a community of interest with other faculty: law students must be enrolled as full-time students, while students in other programs may attend school part-time; the average law school class is approximately 45-50 students, whereas in other graduate departments in the university, the average class is 10-12 students; the law schools are not located on the central campus but rather are housed in separate buildings away from the main campus; both law schools have their own administrative offices and libraries (students' records and transcripts are maintained at the law schools); unlike other departments, the law schools establish their own admission standards; both law schools publish their own law review journal; the law schools conduct clinical programs. The LFA emphasized that the Florida Supreme Court has indirect control over internal operations of the law schools due to its inherent power to govern the practice of law in Florida. Thus an individual must be a graduate from an accredited law school for admission to The Florida Bar. The LFA argued that because the law schools are subjected to accreditation standards established by the American Bar Association and the American Association of Law Schools, the law schools must maintain a certain amount of autonomy from the regular university system which might be compromised by inclusion in an overwhelming employee unit. Thus, external accrediting agencies require that law faculty salaries be maintained above a specified level. And finally, the LFA emphasized that the average faculty salary at the law schools is two to four thousand dollars higher than the average university faculty salary. *Id.* at 40.

IFAS-FA emphasized the following factors in seeking a separate unit for the extension agents faculty. IFAS faculty employees are located primarily in Gainesville; other employees operate out of either the research extension centers or the county extension center. Approximately 95% of the extension faculty derive more than 50% of their salary from extension sources and are considered federal appointments; because the extension service and experimental agricultural stations operated by IFAS cooperate closely with the U.S. Department of Agriculture and make use of federal monies specifically earmarked for the agricultural experiment stations, some IFAS county agents and extension employees derive their salaries solely from federal appropriations. Each county in Florida has an extension program in which the results of research are extended to the people of Florida, and the employees in these extension centers are funded cooperatively by the state and county (though they are considered employees of the University of Florida Campus (UF)). See FLA. STAT. § 241.193(3) (1977). UF has the ultimate responsibility for appointing all IFAS faculty. But local county commissioners have the right to approve or reject the employment of county extension workers in their respective counties, and the U.S. Department of Agriculture must approve the appointment of the IFAS deans. 3 F.P.E.R. at 41; FLA. STAT. § 241.193(3)-(4) (1977). UF can terminate IFAS county agents, but the county can only recommend termination; however, a county can effectively compel the transfer of an IFAS county agent by withholding funds to pay the county-committed portion of the salary. FLA. STAT. § 241.193(2) (1977). Of the approximately 800 IFAS faculty positions, only approximately 60 are full-time classroom teachers, and 160-200 UF faculty members fill IFAS faculty positions through joint appointments with other UF departments and joint relationships among teaching, research, and extension functions. County faculty members are not in tenure-accruing positions but are accorded tenure within the extension service program, the promotion requirements being determined by UF. Accordingly, IFAS-FA argued that it had a separate community of interest from the other faculty in the university system. 3 F.P.E.R. at 41.

Both the Board of Regents and the AAUP were in near agreement with UFF's proposed statewide unit. *Id.* However, the AAUP originally proposed a "pure" teaching unit and sought

1. A systemwide unit composed essentially of all faculty from the nine campuses, including nonacademic professionals performing professional support functions such as research associates, certain directors, librarians, and counselors, and including part-time employees who work half-time or more, as well as certain stipulated chairpersons. Deans, vice-presidents, provosts, presidents, chancellors, vice-chancellors and certain employees in other managerial and confidential positions were excluded from this "large unit."
2. A single, separate systemwide bargaining unit composed of the two State University System Colleges of Law, located at the Gainesville (University of Florida) and Tallahassee (Florida State University) campuses. The deans of these colleges were also excluded.
3. Faculty members employed at the J. Hillis Miller Health Center at the University of Florida in Gainesville (colleges of Medicine, Nursing, Pharmacy, and Veterinary Medicine).
4. Faculty members employed at the Institute of Food and Agricultural Sciences (IFAS) of the University of Florida in Gainesville.¹⁸⁵

PERC rejected a separate bargaining unit for engineering faculty, saying that the evidence to justify such a unit was insufficient. In addition, PERC refused to include graduate and teaching assistants in the large unit.¹⁸⁶ As of the end of January, 1978, there had been no petitions filed for election in the IFAS, Health Center, or law school units. In contrast, the large unit held an election in 1976, in which UFF earned the right to negotiate a contract with FSUS for this unit.¹⁸⁷ A contract dated October 1, 1976, was negotiated. That

the inclusion of all chairpersons and the exclusion of all teaching graduate students. It also sought to exclude a majority of positions on the administrative and professional pay schedule (i.e., nonteaching professional staff). The UFF, on the other hand, had initially sought a single, comprehensive unit of faculty and certain nonteaching professionals, together with teaching and research assistants and department chairmen and directors whose primary responsibility was teaching. The UFF sought to exclude all administrative officers, including but not limited to those with titles such as dean; assistant dean; associate dean; provost; vice-president; president; director; chairpersons or division heads whose duties are not primarily teaching, research, or comparable professional work; registrar; and head coach.

The Board of Regents recommended the exclusion of graduate student teaching positions. BOR also sought a single unit including all instructional and research faculty and administrative and professional employees of the state university system except managerial or confidential employees as defined in the Act.

During the course of the hearing and afterwards, the BOR, AAUP, and UFF stipulated that there are approximately 6,000 to 9,000 employees in the appropriate bargaining unit.

185. 3 F.P.E.R. at 39-40.

186. *Id.* at 42.

187. The results of this election were as follows:

contract provided for a renewal of salary negotiations in October, 1976. These negotiations resulted in agreement after an impasse in April, 1977.¹⁸⁸ The contract expires in June, 1978.

The issue of whether or not university system graduate teaching and research students were covered under PERA and therefore entitled to bargain collectively was not resolved until late in 1977. PERC ruled then that graduate teaching and research students constitute an appropriate statewide bargaining unit. As of January, 1978, a petition for election had not been filed.¹⁸⁹

In Favor Of	Number	Percent
UFF	2,344	46
No agent	1,304	26
AAUP/NEA	701	14
Challenged and void	226	4
Valid and challenged ballots	4,570	90
Total Eligible	5,100	100

United Faculty of Fla., 2 F.P.E.R. 50, 51 (PERC 1976).

188. UFF's final proposal was placed on the bargaining table on January 31, 1977, and an impasse was declared shortly thereafter. As provided by FLA. STAT. § 447.403(2) (1977), PERC appointed former Governor LeRoy Collins as special master. Governor Collins conducted hearings on February 17 and 18, and his report was issued on March 9, 1977. Negotiations between UFF and BOR resumed on March 22. After an all-night bargaining session, both parties accepted the special master's recommendations virtually intact, and agreement was announced on April 20, 1977. See Summary of the Board of Regents/United Faculty of Florida Reopener Negotiations (April 1977) (on file with Florida Board of Regents).

After an agreement had finally been reached by UFF and BOR, the Florida Legislature refused to pay the agreed-upon salary increases. The legislature provided sufficient funds for a 5.87% increase, which was elevated to 7.17% through cutbacks in other areas. This was 1.5% less than the amount agreed on by UFF and BOR, and substantially below the amount recommended to the legislature by Governor Reubin Askew. See Letter from E.T. York (Chancellor of the Board of Regents) to Donald L. Tucker (Speaker of the House) (June 20, 1977) (on file at Florida Board of Regents).

On July 15, 1977, UFF filed an unfair labor practice charge against BOR, pursuant to FLA. STAT. § 447.501(1)(a), (c) (1977). UFF charged BOR with having failed to represent the views of the legislative body of the public employer during the negotiations, as required by FLA. STAT. § 447.309(1) (1977). United Faculty of Fla., No. CA77-083 (Fla. PERC, filed July 15, 1977). The case was closed on October 6, 1977, when PERC issued order no. 77-445, granting BOR's motion to dismiss.

That same day, UFF filed a petition for an administrative hearing before BOR, so that BOR could explain its failure to provide enough money for the salary increases. The petition was filed pursuant to the Florida Administrative Procedure Act, FLA. STAT. § 120.57 (1977). BOR denied UFF's petition for a hearing, and UFF promptly filed another unfair labor practice charge under § 447.501. United Faculty of Fla., No. CA77-087 (Fla. PERC, filed July 22, 1977). The case was closed on January 12, 1978, when PERC issued order no. 78U-014, granting a motion to dismiss.

For complete details, inquiries should be directed to the Commission Clerk, PERC, 2003 Apalachee Pkwy., Tallahassee, Fla.

See text accompanying notes 43-58 for an in-depth examination of the statutory impasse procedures.

189. See United Faculty of Fla., FEA/United, AFT, Local #1880, 3 F.P.E.R. 304, 305

b. Other State Worker Units

In June, 1975, the Florida Nurses Association (FNA) filed a petition for certification seeking a bargaining unit of state nurses.¹⁹⁰ The state sought a larger unit of all positions related to health care functions, including nurses. After extensive hearings, PERC defined by rule a Professional Health Care Unit composed of nurses, therapists, nutritionists, some physicians, psychiatrists, and other health-related professional positions, including supervisory nurses.¹⁹¹ PERC then approved a consent election agreement between the state and FNA.¹⁹² FNA received 1,146 of 1,572 valid and challenged ballots tallied. Consequently, PERC certified FNA as the exclusive bargaining representative for professional health care workers on March 9, 1977.¹⁹⁴ By the first week of May, 1977, the state and FNA had agreed to a contract.

On March 20, 1975, the Florida Police Benevolent Association (PBA) filed a petition for certification seeking a Law Enforcement Unit composed primarily of highway patrolmen—but including corporals, pilots, and certain marine officers.¹⁹⁵ In the ensuing election, PBA received 981 of 1226 votes cast from a total of 1557 eligible voters.¹⁹⁶ The parties negotiated a contract effective July 1, 1976, with a wage and fringe benefits reopener for fiscal year 1977-1978.

Negotiations under the reopener reached an impasse. A special master issued a factfinding report, and the legislature held public hearings on the report in May, 1977. This was the first time the

(PERC 1977), in which PERC noted that "[a] more classic example of an employer-employee relationship can hardly be imagined."

190. Florida Nurses Ass'n, 2 F.P.E.R. 45 (PERC 1976).

191. State of Fla., 2 F.P.E.R. 166, 167 (PERC 1976). The commission specifically amended the hearing officer's recommendation to include health care supervisors in the same unit with other health care professionals, finding that their duties were similar and that the inclusion would not cause enough conflict to merit exclusion.

192. Consent elections are provided for in FLA. DEP'T COM. PERC R. § 8H-3.16. Briefly, if the parties agree on an appropriate unit which has been approved by PERC, they may waive pre-election hearings and hold an election to resolve the issue of majority status.

193. Florida Nurses Ass'n, No. 8H-RC-741-0035 (Fla. PERC Mar. 9, 1977) (Order No. 77E-112).

Votes	Number	Percent
In favor of FNA	1,146	44
Against FNA	196	7
Challenged and void votes	236	9
Valid and challenged counted	1,572	60
Total Eligible	2,635	100

194. *Id.*

195. Florida Police Benevolent Ass'n, No. 8H-RC-756-2085 (Fla. PERC Dec. 15, 1975).

196. *Id.* (Order No. 75E-661).

legislature had held such hearings. The legislature lacked a formal procedure for handling the matter. Nevertheless, the lawmakers sought unsuccessfully to resolve the matter through the appropriation act. The intent of the appropriation act and the effect of the legislature's action will be determined in an administrative hearing.¹⁹⁷

The American Federation of State, County and Municipal Employees (AFSCME) petitioned in August, 1975, to represent employees of state hospitals and rehabilitative and correctional institutions.¹⁹⁸ In response to this petition, PERC defined a human services unit composed of correctional officers, technicians, certain nonprofessional health services workers, and facility services workers. A consent election agreement was approved by PERC on March 16, 1976. PERC later incorporated this unit by rule with the other state worker units. In a 1976 election, AFSCME received 7,754 of 9,591 votes cast. There were 774 votes against representation. There were 14,662 eligible voters.¹⁹⁹ Subsequent contract negotiations produced a written agreement for the period July, 1977 through June, 1978, covering certain conditions of employment and allowing new negotiations over "all unresolved issues . . . including all economic issues"²⁰⁰

Votes	Number	Percent
For PBA	981	63
Against PBA	164	11
Challenged and void votes	85	5
Valid and challenged counted	1,226	79
Total Eligible	1,557	100

197. PBA, as the bargaining agent for the law enforcement bargaining unit, contends that the state has not complied with the intent of the appropriations act regarding salary increases for unit members and has requested a hearing on the matter pursuant to the Administrative Procedure Act, FLA. STAT. § 120.57 (1977). Letter from Mallory E. Horne, Counsel for Police Benevolent Association, to Conley M. Kennison, Director of the Division of Personnel, Florida Department of Administration (Oct. 26, 1977).

198. American Fed'n of State, County & Mun. Employees, No. 8H-RC-751-0202 (Fla. PERC Dec. 21, 1976).

199. *Id.* (Order No. 76E-1405).

Votes	Number	Percent
For AFSCME	7,754	53
Against AFSCME	774	5
Challenged and void votes	1,082	7
Valid and challenged counted	9,591	65
Total Eligible	14,662	100

200. Some of the matters covered were: recognition; dues check-off; a nondiscrimination policy; disciplinary action for employees with and without permanent status; economic matters, including pay adjustments and merit increases; and a no-strike agreement. Agreement

In March, 1976, the State Department of Administration filed a petition, pursuant to sections 120.54(b)(4) and 447.201(1) of the Florida Statutes,²⁰¹ to adopt a rule establishing bargaining units for state employees. In its petition, the department proposed that four statewide occupational units be established by rule in addition to the law enforcement and human services units previously approved by consent elections.²⁰²

At a public hearing on April 8, 1976, PERC determined that it had authority to define state worker bargaining units by rule.²⁰³ PERC reasoned that a rule would expedite the exercise of the constitutional and statutory right to bargain by state employees and also would enhance administration of the collective bargaining process.²⁰⁴ At the conclusion of the hearing, PERC directed its staff to initiate proceedings on the adoption of a rule to establish units for all state employees.²⁰⁵ On June 18, 1976, PERC fulfilled the notice requirements for compliance with the rulemaking procedures of the Florida Administrative Procedure Act.²⁰⁶

The Career Service Employees Federation, Local No. 3186 (CSEF), requested a hearing on the proposed rule. Hearings were held by PERC on July 1, 2, and 21, 1976. CSEF unsuccessfully sought a separate unit for career service employees in the university system.²⁰⁷ On August 12, 1976, the hearing officer issued a report setting forth the factual matters underlying PERC's unit determination by rule and isolating the major points of contention.²⁰⁸ PERC convened on August 16, 1976, to consider the state's petition, as employer, to establish bargaining units for state workers by rule.²⁰⁹ After hearing arguments, PERC adopted the hearing officer's report subject to minor modifications, incorporating it into the commission decision.

PERC's decision and rule defined seven units. These units include the Law Enforcement and Human Services Units.²¹⁰ PERC

between State of Florida and Florida State Employers Council No. 79, American Federation of State, County and Municipal Employees, AFL-CIO, Human Services Unit, at 32 (July 1, 1977).

201. (1977).

202. State of Fla., 2 F.P.E.R. 111 (PERC 1976). The hearing officer's report may be found at State of Fla., 2 F.P.E.R. 120 (PERC 1976).

203. 2 F.P.E.R. 111. PERC found its authority in the Florida Administrative Procedure Act, FLA. STAT. ch. 120 (1977), and PERA, *id.* ch. 447.

204. 2 F.P.E.R. 111.

205. *Id.*; see FLA. STAT. § 120.54 (1977).

206. State of Fla., 2 F.P.E.R. 166, 167 (PERC 1976).

207. See State of Fla., 2 F.P.E.R. 120, 125 (PERC 1976).

208. 2 F.P.E.R. 120.

209. See FLA. STAT. § 120.54(2)-(3) (1977).

210. State of Fla., 2 F.P.E.R. 166; State of Fla., 2 F.P.E.R. 120.

also clarified the Professional Health Care unit by including health care supervisory nurses.²¹¹ By a second amended order, PERC included state attorney investigators and special agents within the Law Enforcement Bargaining Unit.²¹²

On December 28, 1977, the results of an election in the skilled professional unit of state employees were announced. By a 4-1 margin, the 9,200 skilled workers voted to authorize AFSCME to represent them in bargaining talks with the state.^{212.1}

The PERC rule describing state worker units in Florida may be summarized as follows: with respect to state employees, no petition will be entertained, except under extraordinary circumstances, when the petition seeks certification of a bargaining unit not in substantial accord with the provisions of the PERC rule on state worker units. Bargaining units will be established on a statewide basis, with one unit for each of the following occupational groups, excluding in each case all managerial and confidential employees:

NON-PROFESSIONAL EMPLOYEES:

Unit 1: Administrative and Clerical, including all non-professional employees whose work involves the keeping or examination of records and accounts, or general office work;

Unit 2: Operational Services, including laborers and artisans, as well as technicians, mechanics, operators, and service workers [election won by AFSCME on June 16, 1978];

Unit 3: Human or Institutional Services [AFSCME represents this unit under a 1977-78 contract];

PROFESSIONAL EMPLOYEES:

Unit 4: Health Care, including all supervisory employees of health care professionals [FNA represents this unit under a 1977-79 contract];

Unit 5: All other professionals [AFSCME represents this unit under a contract which runs until June, 1978];

211. 2 F.P.E.R. at 167.

212. See Florida Police Benevolent Ass'n, Inc., 3 F.P.E.R. 93 (PERC 1977).

212.1 American Fed'n of State, County & Mun. Employees, AFL-CIO, No. 8H-RC-763-0045 (Fla. PERC Jan. 9, 1978) (unnumbered order). Results of this election were as follows:

For AFSCME	3,522
Against AFSCME	853
Challenged ballots	129
Void ballots	73
Total eligible	8,772
Total valid votes	4,375

LAW ENFORCEMENT EMPLOYEES:

Unit 6: All sworn law enforcement officers [PBA represents this unit under a contract due to expire in June, 1978];

SUPERVISORY EMPLOYEES:

Unit 7: All supervisory employees who have authority, in the interest of the State of Florida and its departments, divisions, bureaus, sections, and sub-sections as the Public Employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust grievances, or effectively to recommend such action, provided such exercise of authority is not a routine or clerical nature. Supervisory employees of the professional employees included in Unit 4 are expressly excluded from this unit. All professional supervisory employees shall be given the opportunity to vote for inclusion in this unit as set forth in section 447.309(4)(h) of the Act. If such employees vote for non-inclusion in this unit, a separate unit shall be established for professional supervisory employees.²¹³

PERC may hold additional hearings concerning the specific job classifications of the above units or approve consent agreements between the state as public employer and employee organizations, provided these agreements are consistent with the unit structure defined in the rule and the requirements for consent agreements prescribed in section 447.307 of the Florida Statutes²¹⁴ and PERC's rules and regulations.²¹⁵

c. Local Government and the Problem of Excessive Fragmentation

At the local government level, PERC has sought to avoid "excessive fragmentation" of employee bargaining units.²¹⁶ Understandably, firefighters and police have their own separate units apart from other local government employees.²¹⁷

213. 2 F.P.E.R. at 167; see FLA. STAT. § 447.203(4)-(5) (1977).

214. (1977).

215. FLA. DEP'T COM. PERC R., §§ 8H-2.01 to .09, -3.15.

216. This is not to say that there should be no fragmentation but only that fragmentation should not be excessive. See Florida Nurses Ass'n, 2 F.P.E.R. 112 (PERC 1976); U.B.C. Pub. Employees Local #2113, 2 F.P.E.R. 91 (PERC 1976). See generally FLA. DEP'T COM. PERC R. § 8H-3.31, under which PERC is authorized to consider "avoiding excessive fragmentation of bargaining units," among other factors, in determining the appropriateness of bargaining units.

217. Application of the "community of interest" criterion under § 447.307(4)(f), Florida Statutes (1977), has resulted in segregation of various police or security employees. In Florida State Lodge Fraternal Order of Police, 1 F.P.E.R. 8 (PERC 1975), PERC approved a unit for police officers but excluded the administrative secretary to the police chief, animal control officers, communications operators, bailiffs, court clerks, clerks, typists, and custodial work-

In local school districts, teachers are usually defined in a separate bargaining unit which may include professional support staff. As noted earlier, supervisory unionism insofar as school principals are concerned presents no problem because principals are specifically excluded from employee units by PERA.²¹⁸ The continuing challenge has been to avoid excessive fragmentation with respect to other local government employees, typically municipal workers.²¹⁹

There are no comprehensive studies of local governmental unit determinations in Florida. Generally speaking, at the local government level one might expect that a medium-sized school district of about 1,000 teachers and an equal number of other school district employees²²⁰ would have three units: (1) a professional unit composed primarily of certified school teachers, but also including coaches, counselors, speech therapists, and similar support staff; (2) a nonprofessional blue-collar unit of bus drivers, food service, custodial and maintenance, and other blue-collar employees; and (3) a clerical and administrative unit of secretaries, bookkeepers, computer or keypunch operators, clerks, and nonsupervisory administrative personnel.²²¹

In contrast, medium-sized municipal employers, in addition to separate units for firefighters and police, might have: (1) a blue-collar unit; (2) a clerical and administrative, or white-collar, unit; and in some cases (3) a professional unit.²²² There is some authority to suggest that small- to medium-sized local governments could have a single comprehensive employee bargaining unit.²²³ In larger

ers as not having a community of interest because the latter did not serve as sworn police officers.

218. FLA. STAT. § 447.203(4)(a)(6) (1977).

219. The effort is to avoid carving a small group of employees out of a large, comprehensive unit. Laborers' Local Union 1306, 1 F.P.E.R. 18 (PERC 1975). See also note 221 *infra*.

220. For example, Marion County had an estimated population of 98,362 in 1976. Bureau of Economic & Business Research, University of Florida, Florida Estimates of Population, July 1, 1977, State, Counties and Municipalities 35 (Feb. 1978). The county employed 1,046 full-time instructional personnel and 1,099 support personnel. DIVISION OF PUBLIC SCHOOLS, FLORIDA DEPT. OF EDUCATION, PROFILE VI, PROFILES OF FLORIDA SCHOOL DISTRICTS 1975-76, at 166 (1976). Florida's most populous county, according to the 1976 estimates, was Dade, with 1,449,300 people; the least populous was Lafayette, with 3,277. See Bureau of Economic & Business Research, *supra* at 34.

221. PERC rejected a unit of full-time bus drivers employed by the Clay County School Board, citing the "principles of efficient administration" criterion set forth in FLA. STAT. § 447.307(4)(a) (1977). Clay County Bus Drivers Ass'n, 1 F.P.E.R. 15 (PERC 1975).

222. See FLA. STAT. § 447.307(4)(h) (1977). This section prohibits the inclusion of professionals and nonprofessionals in the same bargaining unit unless a majority of both units votes for inclusion. PERC's decisions also disclose a trend in favor of separate blue- and white-collar units. See, e.g., Communications Workers of America, 2 F.P.E.R. 158 (PERC 1976).

223. In Laborers' Local Union #1101, 2 F.P.E.R. 161, 161-62 (PERC 1976), PERC rejected a petition for a unit of select groups of county employees in favor of a countywide unit and

cities, the greater numbers of public employees may well result in more fragmented units.

It is fair to say that PERC will favor larger units. However, circumstances may permit some fragmentation if a strong community of interest seems to require it.²²⁴

D. The Negotiation Process

1. Procedures for Negotiation

After an employee union has been certified by PERC as the exclusive bargaining agent for a unit, both the union and the public employer, through its chief executive officer or his representative,

said, "[w]hen seeking to define an appropriate bargaining unit, this Commission must be mindful of the problems which confront an employer that is required to negotiate with numerous bargaining agents. Consequently, we have consistently prohibited fragmentation and have encouraged the formation of broad units."

When dealing with smaller employers with small numbers of employees, an effort may be made to avoid excessive fragmentation by grouping residual employees into the larger unit, even though whether they share a community of interest may be somewhat questionable. Thus, in *Florida Nurses Ass'n*, 2 F.P.E.R. 112 (PERC 1976), in which nurses petitioned for a single unit of full- and part-time registered nurses, and the employer sought a comprehensive professional unit, PERC held for a larger unit—because to have granted the nurses a separate unit would have left forty professional employees without a bargaining unit.

See *Laborers' Local Union No. 1306*, 2 F.P.E.R. 1, 1 (PERC 1975), in which PERC defined a single unit of all city employees and rejected a petition for a separate unit composed of the members of a single department. PERC held that the employees in the proposed departmental unit did not have "a distinct community of interest." *Id.* PERC also noted that the "Commission is looking for broad units, especially if the employer also seeks such a unit." *Id.*

Until recently, the City of Miami had contracts with five bargaining units: (1) police officers; (2) firefighters; (3) blue-collar workers; (4) white-collar workers; and (5) sanitation workers. Of these, the last three contracts have expired and are presently being renegotiated. The City of Miami is continuing to honor the expired contracts on a day-to-day basis. Copies of all five contracts are on file with the Director of Employer Relations for the City of Miami.

224. For example, in *Orange County Police Benevolent Ass'n*, 1 F.P.E.R. 43 (PERC 1975), the commission held that security guards did not share a sufficient community of interest with other airport employees to be included in one overall bargaining unit. *But see* *Town of Palm Beach Firefighters Local #1866*, 2 F.P.E.R. 4 (PERC 1975), in which PERC included paramedics in a unit with firefighters because of significant job interchangeability. The author feels that in the latter case excessive fragmentation was the overriding concern, with the interchangeability rationale being merely a justification for inclusion.

A 1977 amendment to PERA states that "[w]henever a public employer recognizes an employee organization on the basis of majority status and on the basis of appropriateness in accordance with subsection (4)(f)5. of this section, the commission shall . . . certify the proposed unit." Act of June 24, 1977, ch. 77-343, § 12, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.307(1)(b) (1977)). Prior to this amendment, there was some suggestion that historical relationships were not persuasive in justifying separate units. See *Miami Beach Prof'l Lifeguard Ass'n*, 2 F.P.E.R. 149 (PERC 1976) (refusal to define lifeguards as a separate appropriate bargaining unit); *Florida Nurses Ass'n*, 2 F.P.E.R. 112 (PERC 1976) (refusal to define a unit of nurses separate from other professional health care employees).

have the duty to engage in good faith collective bargaining.²²⁵ The chief executive of the public employer is required to consult with, and to represent the views of, the public employer's legislative body during collective bargaining sessions.²²⁶ Any collective bargaining agreement reached must be reduced to writing and signed by the chief executive officer and the bargaining agent.

The agreement is not effective until ratified by employees who are members of the bargaining unit (rather than only by union members) and by the public employer.²²⁷ If either of the parties fails to ratify the agreement, it is returned for further negotiations.²²⁸ When agreement is reached and ratified, PERA requires the chief executive officer to ask the legislative body to finance the provisions of the agreement. If less than the requested amount is appropriated by the legislative body, the agreement must be administered by the chief executive officer on the basis of the amount appropriated.²²⁹

The Florida statute expressly provides that failure to appropriate an amount sufficient to fund the collective bargaining agreement shall not constitute or be evidence of an unfair labor practice.²³⁰ If there are contractual provisions in conflict with the law, the chief executive officer must seek an amendment of the conflicting law or regulation from the appropriate governmental body having amendatory power. Until this is done, the conflicting contractual provision is not effective.²³¹

2. Scope of Negotiation

PERA typically requires negotiation of wages, hours, and terms and conditions of employment.²³² But no PERC decision definitively

225. FLA. STAT. § 447.309(1) (1977); *cf. id.* § 447.501(1)(c), (2)(c) (refusing to bargain collectively or failing to bargain in good faith).

226. FLA. STAT. § 447.309(1) (1977). See note 80 *supra* for an example of the difficulties which can arise when a union feels that the management negotiator has failed in his duty under this provision.

227. FLA. STAT. § 447.309(1) (1977).

228. *Id.* § 447.309(1), (4).

229. *Id.* § 447.309(2).

230. *Id.* See generally note 188 *supra*.

231. FLA. STAT. § 447.309(3) (1977).

232. Numerous sections of PERA refer to wages, hours, and terms and conditions of employment. Basically, the parties are required to negotiate on all the terms and conditions of employment. FLA. STAT. § 447.203(14) (1977). See also *id.* §§ 447.301(2), .309(1), .403(1). The following sections of PERA also directly impact on the bargaining of terms and conditions of employment: *id.* §§ 447.301(2) (retirement not negotiable), .303 (cost of dues deduction is negotiated), .309(5) (duration of contract), .401 (grievance procedures), .405 (criteria which must be considered by special master), .601 (act does not repeal or prohibit merit systems for public employees).

states which subjects are negotiable.²³³ Florida has not yet embraced the mandatory and permissive dichotomy of negotiable subjects used in the private sector²³⁴ and in some other public jurisdictions.²³⁵ PERA does, however, regulate certain matters typically included in collective bargaining agreements. For example, all agreements are limited to three-year terms and must contain all the terms and conditions of employment.²³⁶ A 1977 amendment excludes retirement benefits from negotiations.²³⁷

PERA also requires that every collective bargaining agreement contain a grievance procedure, and the last step of this grievance procedure must end in binding arbitration by a neutral person selected by the parties.²³⁸ The statute also provides that all public employees must have the right to a fair and equitable grievance procedure administered without regard to union membership. However, a 1977 amendment provides that certified employee organizations are not required to process grievances for employees who are not members of that organization.²³⁹

Under a 1977 amendment, dues check-offs are given as a matter of right to a duly certified union but the reasonable cost thereof to

233. However, in *Escambia Educ. Ass'n*, 2 F.P.E.R. 93, 98 (PERC 1976), PERC found that promotions, layoffs, transfers of employees, and wage rates are "at the core of collective bargaining," and thus the employer could not seriously contend that such subjects are not negotiable. In *Duval Teachers United, FEA-AFT, AFL-CIO*, 3 F.P.E.R. 96, 100 (PERC 1977), PERC noted that "[i]t is beyond discussion that the discipline or discharge of an employee is a fundamental condition of employment." Thus, through PERC decisions, a definition of "terms and conditions of employment" is slowly emerging.

234. See generally, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

235. See *Board of Educ. v. Associated Teachers of Huntington, Inc.*, 282 N.E.2d 109 (N.Y. 1972); *Westwood Community Schools*, No. C70 I-152 (Mich. MERC Mar. 24, 1972).

236. FLA. STAT. § 447.309(5) (1977).

237. Act of June 24, 1977, ch. 77-343, § 13, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.309(5) (1977)).

238. FLA. STAT. § 447.401 (1977).

239. Act of June 24, 1977, ch. 77-343, § 14, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.401 (1977)). The impact of this provision on the doctrine of exclusivity must be questioned. A situation might arise in which a minority union could represent an employee under this section. Since the employee may be deprived of the right to be represented by the bargaining agent at the bargaining agent's option, it would seem that the employee should then be permitted representation by another organization. A better position is that § 447.301(4), Florida Statutes (1977), which permits employees to be represented by counsel during the prosecution of their grievances, is sufficient to protect the employee where the exclusive representative refuses to represent the employee in a contract grievance. Thus, minority representation could be denied on the basis that it would be bad policy to encourage minority union representation in grievance administration, thereby undermining the majority status of the incumbent union. The amendment was backed by union lobbyists and seems to be intended to encourage employees to join the union on pain of having to pursue their individual contract grievances at their own expense.

the employer is a proper subject for negotiation.²⁴⁰

There is some indication of legislative intent in the statutory criteria for impasse factfinding that the following subjects should be negotiable: hazards of employment; physical, educational, and intellectual job qualifications; retirement plans; sick leave; and job security.²⁴¹ One could argue that if a special master is legislatively mandated to consider such matters in impasse proceedings, it is fair to conclude that the legislature intended such matters to be negotiated. Presumably, the statutory language mandating bargaining on wages, hours, and terms and conditions of employment should be read in conjunction with the management rights section of the statute.^{241.1} PERC has held that there may be some overlap between management rights and working conditions, and that the employer "must negotiate the areas of overlap."^{241.2}

A provision in the 1977 amendments provides for expedited procedures before PERC to ascertain questions of negotiability.²⁴²

3. *Statutory Procedures for Impasse Resolution*

When a dispute exists and agreement cannot be reached between negotiating parties, impasse may be created when one of the parties so declares in writing to the other.²⁴³ Permissive mediation at the request of either or both of the parties is authorized by PERA. Thereafter, if the impasse still exists, PERC must appoint a special master to conduct a factfinding proceeding to define the areas of dispute and render a decision with recommendations for resolving all contractual issues.²⁴⁴

The special master, who is authorized to issue subpoenas and administer oaths, must transmit his recommended decision to

240. Act of June 24, 1977, ch. 77-343, § 10, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.303 (1977)).

241. See FLA. STAT. § 447.405 (1977) (defining the statutory standards a special master must apply at impasse). It should be noted that the inclusion of retirement plans as a factor to be considered by the special master, *id.* § 447.405(4)(f), would appear to conflict directly with *id.* § 447.309(5), which expressly removes the subject of retirement from bargaining.

241.1. *Id.* § 447.209.

241.2. Duval Teachers United, FEA-AFT, AFL-CIO, 3 F.P.E.R. 96, 100 (PERC 1977).

242. Act of June 24, 1977, ch. 77-343, § 8, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.207(7) (1977)). PERC is in the process of promulgating rules pursuant to that statute.

243. FLA. STAT. § 447.403(1) (1977).

244. *Id.* § 447.403(2)-(3). The law also requires the special master to consider the following factors in making his report: local income comparison of similar governmental and private jobs; the interest and welfare of the public; comparison of peculiarities of employment as to hazards, physical, educational, or intellectual job qualifications, training and skills, retirement plans, sick leave, job security, and availability of funds. *Id.* § 447.405.

Compensation for the special master and stenographic and other expenses of the factfinding proceedings are borne equally by the parties. *Id.* § 447.407.

PERC within fifteen days after the final hearings.²⁴⁵ PERC must then transmit the decision to the parties within five days.²⁴⁶ The decision must then be "discussed" by the parties and is deemed to be approved by both parties unless either rejects it within fifteen days of receipt.²⁴⁷ If a party chooses to reject the report, it must so indicate in writing to the other party and state reasons for the rejection.²⁴⁸ If either of the parties rejects the special master's recommended decision, the chief executive officer must submit it to the legislative body together with his recommendations concerning the dispute.²⁴⁹ The employee organization must also submit its recommendations to the legislative body.²⁵⁰ Where faculty members within the university system are concerned, the Board of Regents is the public employer. But the Governor may also submit his recommendations.²⁵¹

The legislative body then must conduct "forthwith" a public hearing at which both parties explain their positions with respect to the factfinding report and the recommendations. Thereafter, the legislative body must take "such action as it deems to be in the public interest, including the interest of the public employees involved."²⁵² Thus, the ultimate power to resolve impasse disputes involving public workers rests in the legislative body. The parties may not resort to the extremes which are available in private disputes. Strikes by public employees are unconstitutional in Florida.²⁵³

Presently, there seem to be few alternatives to factfinding. Since public strikes are unconstitutional in Florida, the use of economic weaponry to "encourage" good faith compromise at the bargaining table is not authorized. Binding arbitration for impasse disputes does not appear to be a politically acceptable alternative.²⁵⁴ The legislature has rejected this approach. Management seems uni-

245. *Id.* § 447.403(3).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* § 447.403(4)(a).

250. *Id.* § 447.403(4)(b).

251. *Id.* § 447.403(4)(a).

252. *Id.* § 447.403(4)(d); see note 188 *supra*.

253. FLA. CONST. art. I, § 6; FLA. STAT. §§ 447.501(2)(e), .505 (1977).

254. Tallahassee Democrat, Apr. 12, 1977, § A, at 3, col. 2. See also Tampa Tribune, Dec. 12, 1977, § A, at 14, col. 1, relating to the Constitution Revision Commission's approval of a proposal which would prohibit binding interest arbitration of public employees. The following proposal will now be part of the proposed constitution to be submitted to the people in November, 1978: "Binding arbitration is prohibited to resolve impasse in collective bargaining negotiations concerning wages, hours and terms and conditions of employment between public employees and a public employer."

formly opposed to binding arbitration, and the public unions do not unanimously support it.

Pressure to adopt binding impasse arbitration for firefighters met with little success in the 1977 session of the legislature.²⁵⁵ If binding arbitration were to be adopted in Florida, which now seems unlikely, it would probably be limited to firefighters and perhaps police.²⁵⁶ Apparently factfinding will be used in Florida for some time to come.

The theory behind factfinding is that it will encourage public and political pressure by illuminating the issues; this in turn is thought to facilitate settlement. The intervention of a third party neutral is assumed to encourage the spokesmen for both management and labor to rethink their positions and perhaps make concessions. Factfinding requires gathering information and data in support of one's position on impasse issues. Extreme or unsubstantiated positions lose force and status in the factfinding forum.

A factfinder's report is advisory; it usually identifies the issues in dispute; and it contains recommendations for dispute resolution. Thus, the factfinding process is intended to crystallize thoughtful public opinion and stimulate commentary by the news media. Finally, factfinding fulfills the public's right to know—the right to be informed on the issues and the merits of the bargaining dispute. This in turn is likely to bring political awareness to the legislative body which makes the final and binding determination resolving the dispute.²⁵⁷ Often, too, labor and management are able to make politically unpalatable concessions (*i.e.*, to their respective constituencies)—since such concessions are identified with the factfinder's report. All in all, the success of factfinding depends on the negotiating skill and civility of the parties, on informed persuasion, and on a capable factfinder. Indeed, an effective factfinder will often mediate the parties to settlement and issue no report at all.

Factfinding in Florida is not without its problems. Unfortunately, there are no completed evaluative field studies on the subject. The following outline of the difficulties attendant to factfinding in Florida is based on the experience and observation of the author.²⁵⁸

255. Tallahassee Democrat, Apr. 12, 1977, § A, at 3, col. 1.

256. By August, 1972, four states provided for compulsory arbitration for both firemen and policemen: Pennsylvania, Michigan, Rhode Island, and South Dakota. Vermont and Wyoming provide for binding arbitration for firemen alone. Nevertheless, binding arbitration provisions for public employees who provide "essential services" appear to be the wave of the future. See Shaw, *The Development of State and Federal Laws*, in PUBLIC WORKERS AND PUBLIC UNIONS 32 (S. Zagoria ed. 1972).

257. See GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, STATE OF NEW YORK, FINAL REPORT 37 (1966) (resolution of deadlocks in collective negotiations).

258. The author is conducting a field study to evaluate the effectiveness of Florida's

The problems Florida has encountered in impasse factfinding may be attributed to five general factors. First, and wholly apart from Florida's peculiarities, there are inherent problems with factfinding even at its best. When overused, factfinding tends to discourage good faith bargaining during the table negotiations, and thus the responsibility of negotiating and its problem-solving virtues are lost. There is a tendency for the parties to resist compromises and to engage in political gamesmanship if one or both view factfinding as part of the negotiation process.²⁵⁹ If a party thinks that the factfinder will make recommendations in its favor, there is little incentive to reach a compromise before factfinding takes place. So, too, if a party feels it has the political clout to persuade the legislative body to adopt its position at the hearing on the factfinding report, there will be little incentive to bargain at the table. Table negotiations then become a mere preamble to the political maneuvering and negotiations during and after factfinding.²⁶⁰

When factfinding is automatic, collective bargaining at the table is discouraged. Involuntary factfinding does not easily accommodate the situation where positions have polarized and negotiations have degenerated into a pure power struggle. In this situation, factfinding and the hearing on the report are seen exclusively as the means for inflicting injury on the adversary. Given an out-and-out power struggle, factfinding as an exclusive system for dispute settlement is ineffective in proportion to its being involuntarily imposed on the parties by law. Thus, in a total breakdown situation, it merely becomes an automatic part of the dispute. The author's experience as a practitioner convinces him that for factfinding to work, there must be a considerable degree of civility and negotiating skill. In the hands of the inexperienced negotiator, who views it as a cure-all, or the sophisticated obstructionist, factfinding tends to be ineffective.²⁶¹

A second factor hindering the impasse machinery in Florida is the resistance by some public employers to the whole idea of bilateral determination of terms and conditions of employment. The bilater-

impasse procedures. This study should be completed in the summer of 1978. The generalizations in this article are predicated in part on some emerging trends and are based in part on information gathered to date and on conversations with practitioners. For a similar study of the factfinding experience conducted in New York, see B. YAFFE & H. GOLDBLATT, *FACTFINDING IN PUBLIC EMPLOYMENT DISPUTES IN NEW YORK STATE: MORE PROMISE THAN ILLUSION* (1971).

259. See H. WELLINGTON & R. WINTER, *supra* note 82, at 178-80. See also B. YAFFE & H. GOLDBLATT, *supra* note 258, at 57.

260. Gotbaum, *Collective Bargaining and the Union Leader*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 83 (S. Zagoria ed. 1972).

261. *Id.*

alism implicit in the collective bargaining process is viewed as inconsistent with traditional concepts of sovereignty.²⁶² For example, a public employer might refuse to negotiate on a number of issues. This refusal to bargain may needlessly polarize the parties and trigger an impasse. Such disputes over negotiability often emerge from a belief that negotiating the disputed issues into a contract would result in an illegal delegation of employer authority or a total loss of employer control over a significant aspect of the governmental enterprise.

Part of the concern stems from the fact that Florida law requires that grievance procedures end in binding third party arbitration as to the interpretation and application of the agreement. Thus, once an issue is negotiated into the contract, employer authority exercised during contract administration is subject to challenge by the determination of a third party not accountable to the people.²⁶³ A variation on this theme is that since existing state law, outside of PERA, places responsibility over a particular negotiation issue with the employer, the employer accordingly has no authority to negotiate on that issue; the issue, therefore, is "non-negotiable."²⁶⁴ Still another argument is that the management rights provision in PERA reserves to the public employer unilateral control over standards of services, unilateral control over its organization, and the right to take disciplinary action for cause.²⁶⁵ The advocates of this position pay little heed to the provision's qualifying sentence subjecting management's rights to the union's right to raise grievances when such management rights "have the practical consequence of violating the terms and conditions of any collective bargaining agreement."²⁶⁶ As a result, impasses over negotiability may well result in an unfair labor practice charge by the union against the public employer for failure to negotiate in good faith.

262. On March 21, 1944, the Florida attorney general issued an opinion stating in part that "no organization, regardless of its affiliations, union or nonunion, can tell a political subdivision possessing the attributes of sovereignty, whom it can employ, how much it shall pay them, or any other matter or thing relating to its employees." 1944 FLA. OP. ATT'Y GEN. 044-88. See also *Mugford v. Mayor of Baltimore*, 44 A.2d 745 (Md. 1946).

263. See *Impasse Between Duval County School Bd. & Duval Teachers United AFT, AFL-CIO*, No. 8H-SM-76-39, slip op. at 4 (Fla. PERC Aug. 31, 1976). On appeal, the First District Court of Appeal refused to rule on the constitutionality of PERA's statutory requirement of binding grievance arbitration and sustained PERC's finding that the school board refused to bargain in good faith. *Duval County School Bd. v. Florida Pub. Employees Relations Comm'n*, 353 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1978).

264. Cf. *West Hartford Educ. Ass'n v. Decourcy*, 295 A.2d 526 (Conn. 1972); *West Irondequoit Bd. of Educ.*, 4 P.E.R.B. 3070 (N.Y. PERB 1971).

265. FLA. STAT. § 447.209 (1977).

266. *Id.*

At the core of these disagreements is the notion that sovereign authority ultimately reposes in the people and their duly elected officials. To the extent that collective bargaining involves bilateral determination of employment conditions, it is seen by some employers as creating unavoidable and unlawful interference with the sovereign authority of public officials.²⁶⁷ Thus, such labor-oriented devices as exclusive recognition and "check-off" are often seen as inviting organized interference with the conduct of public business and as giving improper preference to union status.²⁶⁸ Moreover, use of grievance arbitrators to resolve contract disputes or use of third-party factfinders to make pronouncements concerning the merits of contract disputes are seen as improper abandonment by the sovereign of its authority and public responsibility. The strike as a means for concerted coercion of the employer is viewed as simple insurrection, if not actual revolution.²⁶⁹

In essence, the sovereignty argument is that governments have the unilateral power and responsibility to fix conditions of employment. This unique power cannot be given, taken away, or shared. Organized efforts to interfere by means of collective bargaining are thus viewed as irreconcilable with the concept of sovereignty and sovereign authority.²⁷⁰ In extremis, the argument is a total rejection of the collective bargaining process.

The extent to which this perception is held by the public employer bears directly on the chances for compromise at the bargaining table and for acceptance of a factfinding report. It stands to reason that no impasse procedure will be effective which relies on advisory factfinding and vests final authority in a group of uncompromising public officials who reject collective bargaining. In *Duval County School Board v. Florida Public Employees Relations Commission*, the court, in sustaining a finding that the school board had failed to bargain in good faith, summed up its frustration toward this attitude:

The Public Employees Relations Act is the law of our State. Whether we agree with it or not, we must comply with it. If

267. See, e.g., *State College Educ. Ass'n v. Pennsylvania Labor Relations Bd.*, 306 A.2d 404 (Pa. Commw. Ct. 1973), *rev'd*, 337 A.2d 262 (Pa. 1975). See also H. WELLINGTON & R. WINTER, *supra* note 82.

268. "Check-off" is a commonly used term which refers to the process of dues deduction by the employer and subsequent remittance to the employee organization. *Mugford v. Mayor of Baltimore*, 44 A.2d 745 (Md. 1946); FLA. STAT. § 447.303 (1977).

269. See Shaw, *The Development of State and Federal Laws*, in PUBLIC WORKERS AND PUBLIC UNIONS 22 (S. Zagoria ed. 1972).

270. K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 11-20 (1967).

changes are desired, they must be made by the Legislature.

Every public employer, public employee and union must exert every effort to cooperate with each other and to build respect for each other. Collective bargaining is not and should not be a game. Representatives of the public employer and the union should and must be able to sit down together and negotiate an agreement which will be beneficial and fair to all parties. There is too much at stake to play games. Idealistic? Perhaps. Too much to ask? We think not.²⁷¹

A third factor contributing to Florida's factfinding difficulties might be labeled, very simply, inexperience. PERA's statutory scheme of dependence upon factfinding to resolve negotiation impasses requires two critical elements. First, there must be a strong and vigorous administration of the impasse machinery by PERC. Indeed, PERA makes PERC responsible for maintaining lists of qualified factfinders (called "special masters" in Florida) and assigning them to disputes.²⁷² This entails identifying and training qualified special masters, coupled with selective monitoring of impasses around the state. The monitoring function should certainly include keeping records of impasse issues and other pertinent factual information, and performing postproceeding evaluation of the special masters. In unusual and particularly critical impasses, PERC should be available during the proceedings to assist the special master and parties. At the time the law first became operative, PERC's administrative instability²⁷³ proved unequal to these responsibilities. The situation was further aggravated by a dearth of experienced special masters.

Secondly, successful factfinding requires experienced negotiators. There were relatively few seasoned negotiators on either side—this was especially true of the employers—during the initial rounds of negotiation under the new law. Experienced negotiators are critical because they are the key to preparation of the advocates' cases before the special master. Moreover, it is not uncommon for negotiations, or even mediation,²⁷⁴ to take place during the formal factfinding proceedings. Negotiations may resume after the factfinder's report has been issued. Consequently, the negotiating skill and the

271. 353 So. 2d 1244, 1249 (Fla. 1st Dist. Ct. App. 1978). See generally Wollett, *supra* note 82.

272. FLA. STAT. § 447.207(5) (1977).

273. See note 28 and accompanying text *supra*. PERC simply did not have continuity of leadership to give it direction in the important area of impasse resolution.

274. See J. SIMKIN, *FACT-FINDING: ITS VALUES AND LIMITATIONS IN ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS* 165-72 (1970).

experience of both parties are critical to the success of factfinding.

In many instances, public employers in Florida were ill-prepared for collective bargaining. Many employers gave little thought to training or hiring high-level administrators in anticipation of bargaining until unions had been certified and sought negotiation dates. Inexperience on both sides caused common mistakes. For example, in some cases a school superintendent or, worse, a school board chairman, decided to be the negotiator. Or perhaps a staff member of a public employer began to negotiate and then, in mid-stream, the chief executive officer or legislative body wanted to replace him and start over again.²⁷⁵

In some cases negotiators were experienced in only the private sector and knew little of local government politics, public finance, or education. Newly elected and inexperienced union leaders, with the defeated minority union watching from the fence, were pressured into extravagant demands. Thus, heated and extended debates over what is negotiable, blatant gamesmanship, or plain ineptness managed to divert everyone's attention from the serious business of collective bargaining.

Inexperienced negotiators can easily warp the factfinding process. A good illustration is the situation in which table negotiations have been so badly handled that the parties reach impasse on almost all the contract issues—practically speaking, no negotiations have taken place. The special master, then, is presented with the practical necessity of developing a factfinding report which in effect results in a recommended contract.²⁷⁶ It is nothing short of ludicrous to expect acceptability from such a proceeding.

A fourth factor contributing to Florida's factfinding problems, primarily of concern in the school districts, has been the role of the legislative body.²⁷⁷ Under Florida's factfinding scheme, the legisla-

275. These are common errors which have come to the author's attention in conversations with persons involved in public labor negotiations in Florida. Unfortunately, little documentation exists. Note, however, *City of Homestead v. International Ass'n of Firefighters Local 2010*, 291 So. 2d 38 (Fla. 3d Dist. Ct. App. 1974) (pre-PERA).

276. For an example of a multiple-issue impasse, see *Impasse Between Duval County School Bd. & Duval Teachers United AFT, AFL-CIO*, No. 8H-SM-76-39 (Fla. PERC Aug. 31, 1976). See also *Madison County Educ. Ass'n*, 4 F.P.E.R. ¶ 4006 (PERC 1977).

Sometimes during negotiations distrust was provoked by having the opposing party bring in an outsider or "hired gun" as negotiator. See, e.g., *Duval County School Bd. v. Florida Pub. Employees Relations Comm'n*, 353 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1978) (union outside negotiator); *School Bd. v. Public Employees Relations Comm'n*, 350 So. 2d 819 (Fla. 1st Dist. Ct. App. 1977) (Escambia County) (employer outside negotiator).

277. The statutory definition of the "legislative body" may be found in FLA. STAT. § 447.203(10) (1977). See *id.* § 447.403(4)(a) (legislative body involvement in impasse resolution); see, e.g., *United Faculty v. Palm Beach Junior College Bd. of Trustees*, No. 76-2594 (Fla. 2d Cir. Ct., filed Nov. 30, 1976) (voluntarily dismissed June 27, 1977, because moot when

tive body serves as impartial arbiter between the union and the public employer.²⁷⁸ Impartiality is nearly impossible when the school board is both the public employer (with responsibility for negotiating the contract) and the legislative body (with ultimate authority for resolving contract disputes). Nothing undermines the validity of factfinding in the school districts more than the fact that the school boards wear two hats.

This dual role is especially provocative where the parties have polarized in an acrimonious impasse and the school board is anti-union. On such occasions, the hearing on the factfinder's report before the school board assumes an air of charade. Accordingly, the factfinding report proves unpersuasive and is rejected out of hand. The entire impasse procedure for factfinding becomes counterproductive when the school board shows little disposition to retreat from its initial negotiating stance and refuses to provide the teachers' union with a face-saving position. No agreement is reached, and the union is faced with two options: to strike illegally or to beat a humiliating retreat. The latter usually results in some form of guerrilla warfare: underground papers with unflattering cartoons of school administrators, political efforts to run candidates against school officials who are perceived as anti-union, and confrontation over policy and other political decisions in the newspapers. And all of this leads to a year or more of petty employer/employee conflict. True enough, labor disputes will sometimes degenerate regardless of procedures and legal definitions, but the wearing of two hats by one party exacerbates the potential for conflict.

A fifth factor is the employees' equivalent to the public employer's sovereignty argument: that is, *everything* is negotiable. A "great expectations" syndrome tends to develop, typically as a result of a close election campaign. Once the election is over, expectations raised among the workers by campaign promises must be met by the winning union. Elated workers were led to expect that the dead hand of bureaucracy—previously characterized as synonymous with archaic salary classifications, wornout or nonexistent grievance procedures, unduly restrictive work rules, and authoritarian administrative procedures—would be triumphantly eliminated in one fell swoop in the first round of contract negotiations.

Too often, dramatic inroads are sought by the inexperienced union through a list of contract demands covering as many as two or three hundred items. And pressure for dramatic victories is in-

legislature amended PERA to make board of trustees the legislative body).

278. FLA. STAT. § 447.403(4)(c) (1977).

creased by competition between unions (as, for example, the American Federation of Teachers and the National Education Association). Inflated organizational rhetoric in the heat of highly competitive organizing campaigns does not help. From time to time, the news media aggravate the situation by focusing on the more provocative statements of public and union officials.²⁷⁹

In summary, then, these factors have contributed to difficulties in resolving contract impasses in Florida: factfinding with its inherent limitations; strongly held views by certain employers about sovereign authority; pervasive inexperience on both sides of bargaining disputes; unrealistic expectations encouraged by competitive organizational campaigns; and the dual role of the school boards as both negotiators and legislative decisionmakers.

Two PERC decisions are worth noting in this context. Both focus primarily on the issue of what constitutes good faith bargaining, and both illustrate the attitudes which have contributed to Florida's difficulties. To a lesser degree, the cases address the knotty problem of sovereign authority and negotiability.

In *Escambia Education Association*, the union, Escambia Education Association (EEA), filed an unfair labor practice charge against the employer, the School Board of Escambia County.²⁸⁰ The charge alleged infringement of bargaining rights because union members were photographed while engaged in orderly and lawful informational picketing.²⁸¹ After studying the record, PERC concluded—contrary to the finding of the hearing officer—that “photographic surveillance is inherently coercive . . .”²⁸² The union also alleged that the school board had engaged in surface bargaining and had wrongfully refused to check-off dues.²⁸³ The PERC decision in *Escambia* is instructive on the issue of good faith bargaining.

PERC concluded that the school board did not bargain in good faith on dues deductions.²⁸⁴ Under prior agreements, the employer had deducted dues on a monthly basis at a cost to EEA of \$3,900

279. During negotiations between the Duval Teachers United (DTU) and the Duval County School Board, the Jacksonville newspaper published a great many articles, some of which resulted in unfair labor practice charges by the union. During the unfair labor practice proceeding, PERC found that the employer's release to the media of information which DTU had repeatedly requested but had been unable to obtain, was one factor leading to a finding of failure to bargain in good faith. PERC also found that the school board's “repeated practice of releasing information to the media undermined the bargaining process. . . .” Duval Teachers United, FEA-AFT, AFL-CIO, 3 F.P.E.R. 96, 101 (PERC 1977).

280. *Escambia Educ. Ass'n*, 2 F.P.E.R. 93 (PERC 1976).

281. *Id.* at 94; see FLA. STAT. § 447.501(1)(a) (1977).

282. 2 F.P.E.R. at 99.

283. *Id.* at 94; see FLA. STAT. § 447.501(1)(c) (1977).

284. *Id.* at 98.

annually (\$325 per month). Each teacher received notice from the school board that dues would be deducted only on a lump sum annual basis unless the teachers withdrew their dues deduction authorizations. EEA knew nothing of the proposed lump sum deduction policy prior to the notice to the teachers, and in fact the employer did not make the deduction. Several teachers withdrew their authorizations and resigned from the union. Thereafter, apparently at the instigation of an outside consultant, the employer demanded payment of \$12,500 annually for the check-off privilege, *after* an apparent agreement for a lesser amount had been reached. PERC concluded that the school board hoped to "secur[e] mass cancellations from employees of their dues authorizations; thereby dissipating the Association [EEA] majority and undermining its efforts to represent its constituency."²⁸⁵

PERC said that in considering whether there has been a breach of the duty to bargain in good faith, the employer's conduct at the bargaining table will be judged and considered by the "totality" of the circumstances. Thus, if an examination of all the facts and circumstances giving rise to the dispute indicates that no single act standing alone is clear evidence of a per se refusal to bargain, the commission will examine the totality of the employer's conduct during the bargaining process.²⁸⁶ PERC also said that the employer's "constant insistence upon 'total package agreement' is inconsistent with the duty to bargain."^{286.1}

After considering the full history of the negotiations, PERC found a general failure to bargain in good faith. The school board repeatedly had failed to attend scheduled meetings, arrived late and unprepared to discuss issues, refused to discuss issues, and refused EEA access to information it could easily have provided.²⁸⁷ PERC came to the "inescapable conclusion that the [employer] conceived every scheme imaginable to avoid arriving at a collective bargaining agreement . . ."²⁸⁸ Accordingly, the commission ordered reinstatement of the check-off at the previously agreed cost of five cents per card, ordered the employer to stop bargaining in bad faith, and ordered the employer as well to stop photographing and otherwise engaging in surveillance of its employees.²⁸⁹

The PERC decision was appealed to the First District Court of

285. *Id.*

286. *Id.*

286.1. *Id.*

287. *Id.* at 95-97.

288. *Id.* at 98.

289. *Id.* at 100.

Appeal, which affirmed PERC.^{289.1} On appeal the employer argued that PERC erred as a matter of law in ordering the employer to implement dues deduction in the absence of a collective bargaining contract. The court said the issue was moot in view of the 1977 amendments to PERA permitting check-off during the union certification period. The court further said, however, that under section 447.503(4)(a), Florida Statutes, PERC may take "such positive action . . . as will effectuate the policies of this part" to remedy unfair labor practice violations; therefore, the commission had the authority to issue such an order.^{289.2}

In *Duval Teachers United, FEA-AFT, AFL-CIO*, there was an impasse on a substantial number of issues.²⁹⁰ The recommendations in the factfinding report by the special master were the equivalent of an entire collective bargaining agreement between the parties.²⁹¹ The school board rejected the report in toto.²⁹² The Duval Teachers United (DTU) filed charges of unfair labor practices against the Duval County School Board, alleging interference, coercion, and failure to bargain in good faith.²⁹³ PERC's complaint alleged that the school board had engaged in surface bargaining, that it had "persisted in a fixed and unalterable position that certain mandatory subjects of bargaining were not negotiable" and thus had refused to bargain on those issues. The employer had also released to the press a salary proposal which had never been submitted during the bargaining sessions.²⁹⁴

PERC noted in its decision that a statement was made a few days prior to the beginning of the negotiations by the school superintendent, publicly attacking the union negotiator as an "outside agitator and hired gun" and accusing DTU of "coming to the table to pick the pockets of the taxpayers."²⁹⁵ The record indicated that DTU attempted to negotiate issues concerning discipline and discharge, personal rights, academic freedom, and teacher transfer, but it was informed by the employer's negotiator that these subjects were "inherent management rights" and therefore non-negotiable.²⁹⁶ The

289.1. *School Bd. v. Public Employees Relations Comm'n*, 350 So. 2d 819 (Fla. 1st Dist. Ct. App. 1977) (Escambia County).

289.2. *Id.* at 823.

290. 3 F.P.E.R. 96 (PERC 1977).

291. *See Impasse Between Duval County School Bd. & Duval Teachers United AFT, AFL-CIO*, No. 8H-SM-76-39 (Fla. PERC Aug. 31, 1976).

292. 3 F.P.E.R. at 99.

293. *Id.* at 96.

294. *Id.* Apparently, the employer publicly stated that the teachers lost a 6.25% raise because DTU forced negotiations into an impasse at the time negotiations broke down.

295. *Id.* at 97.

296. *Id.*

employer's counter proposals on other items merely repeated the language of the previous year's contract. Furthermore, certain ground rules of negotiation which were agreed to by the parties were used in bad faith by the employer to frustrate DTU's efforts to schedule agendas for negotiations and to improvise meeting times.²⁹⁷ In addition, the employer released to the media a list of non-negotiable issues, which list DTU had repeatedly requested—to no avail—during the bargaining sessions.²⁹⁸

PERC reaffirmed its position in *Escambia*, saying that the employer's "total conduct during the course of negotiations . . . in light of all of the circumstances in the particular case" will determine whether or not there has been good faith bargaining.²⁹⁹ On the issue of what subjects are mandatory items for negotiation, the employer had relied heavily on the management rights provision in PERA and had pointed to the Florida Constitution, which provides that the school board "shall operate, control and supervise all free public schools"³⁰⁰ Rejecting the school board's position, PERC said that school board constitutional responsibility and PERA's management rights provision do not stand alone. PERC said that equal consideration must be given to the constitutional right of public employees to bargain collectively and to the PERA mandate to bargain in good faith.³⁰¹

The commission stated that an employer has a duty to negotiate in an effort to determine whether a provision is negotiable of right or is a managerial prerogative. This includes negotiating in good faith those areas which overlap.³⁰² Here the school board had failed to determine where "on the continuum of negotiability" DTU's proposals lay.³⁰³ Accordingly, PERC held that the "threshold refusal to discuss these items with an open mind" was the basis of the failure to bargain in good faith. By entering negotiations "with a fixed and pre-conceived determination" as to which issues it would negotiate, the employer had committed the charged violation.³⁰⁴

The commission recognized that the discussion in negotiation may reach a point at which the employer need not negotiate. When that happens, PERC conceded that the employer need not yield if its position is reasonable. But the employer must "maintain . . . an

297. *Id.* at 101.

298. *Id.*

299. *Id.* at 99.

300. *Id.*; see FLA. CONST. art. IX, § 4(b); FLA. STAT. § 447.209 (1977).

301. 3 F.P.E.R. at 99-100.

302. *Id.*

303. *Id.*

304. *Id.*

open mind.”³⁰⁵ The school board contended during negotiations that, rather than reject the non-negotiable items, any agreement with respect to such issues should be appended to the agreement.³⁰⁶ The union refused to agree to this arrangement. Arguably, appended agreements on the alleged non-negotiable issues would not be subject to the contract grievance procedure required by PERA to end in final and binding arbitration. PERC rejected the school board’s approach as contrary to the Act, which requires that any collective bargaining agreement contain all of the terms and conditions of employment agreed upon by the parties.³⁰⁷

The school board also argued that the matter was now moot since the parties had gone through the statutory impasse procedures, including factfinding. But PERC rejected this argument and held that “[a]n employer will not be permitted to engage in a course of conduct tantamount to a refusal to bargain and subsequently be allowed to ‘cleanse’ its illegal activity through the statutory impasse procedures.”³⁰⁸ Accordingly, the commission ordered the parties to bargain not only for the future, but also for monetary benefits sought by DTU in past negotiations.³⁰⁹

Thus *Duval* reaffirmed the “surrounding circumstances” rule laid down in *Escambia*, which said that there was a duty to negotiate

305. *Id.* at 101.

306. *Id.*

307. *Id.* PERC noted:

This contention flies squarely in the face of the statute. Section 447.309(5) of the Act states:

Any collective bargaining agreement . . . shall contain *all* of the terms and conditions of employment of the employees in the bargaining unit during such term except those terms and conditions provided for in applicable merit and civil service rules and regulations. (Emphasis added).

Respondent’s insistence on appending items to the bargaining agreement thereby making them not subject to the grievance procedure, cannot be permitted in light of the express language of the Act. See also Section 447.209 of the Act. By agreeing to certain terms and subsequently refusing to integrate them into the contract, Respondent violated Section 447.501(1)(a) and (c) of the Act.

Id. In 1977, § 447.309(5) was amended to provide: “except those terms and conditions provided for in any Florida Statute or appropriate ordinances relating to retirement and in applicable merit and civil service rules and regulations.” Act of June 24, 1977, ch. 77-343, § 13, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.309(5) (1977)) (emphasis added). Section 447.301(2), which creates the substantive basis for negotiating terms and conditions of employment, was also amended in 1977. That section now provides that public employees have the right to be represented and to negotiate terms and conditions of employment, “excluding any provisions of the Florida Statutes or appropriate ordinances relating to retirement.” Act of June 24, 1977, ch. 77-343, § 9, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.301(2) (1977)). The legislative intent clearly was to exclude retirement matters from negotiation.

308. 3 F.P.E.R. at 101-02.

309. *Id.* at 102.

the issue of negotiability, and rejected attempts to append certain agreements to the negotiated contract, rather than include them within the basic document.

The PERC decision was appealed to the First District Court of Appeal, which affirmed PERC.^{309.1} The court rejected the employer's contention that the determinative issue was whether or not subjects labeled non-negotiable by the board were in fact mandatory subjects of negotiation and simply affirmed PERC's finding of bad faith bargaining. The court noted that whether a party bargains in good or bad faith is a factual determination dependent on the circumstances of the particular case. Since there was competent and substantial evidence before PERC to support its findings, the court upheld them.

Although the school board raised the issue, the court declined to rule on the constitutionality of PERA's requirement that binding grievance arbitration be included in all collective bargaining agreements.^{309.2}

The court sternly condemned those who view collective bargaining as a game and reminded public employers and unions of their responsibility to negotiate in good faith to reach fair agreements.^{309.3}

In 1977, the legislature added a definitional section on good faith bargaining to the statute. The new section is basically a codification of the *Escambia* and *Duval* PERC decisions, together with private sector rules previously developed under the National Labor Relations Act. The section provides that good faith bargaining requires the parties "to meet at reasonable times and places," with intent "to reach a common accord." In deciding whether good faith bargaining has occurred, PERC will "consider the total conduct of the parties."³¹⁰

The 1977 amendment goes on to list incidents which are "indicative of bad faith" These include: failure to meet at reasonable times,³¹¹ unreasonable restrictions on "prerequisites to meeting,"³¹² failure to "discuss bargainable issues,"³¹³ refusal to pro-

309.1. *Duval County School Bd. v. Florida Pub. Employees Relations Comm'n*, 353 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1978).

309.2. *Id.* at 1249-50.

309.3. *Id.* at 1249; see note 271 *supra* and accompanying text.

310. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17) (1977)).

311. *Id.* (codified at FLA. STAT. § 447.203(17)(a) (1977)); *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850 (1st Cir. 1973); *NLRB v. Exchange Parts Co.*, 339 F.2d 829 (5th Cir. 1965); *Solvay Process Co. v. NLRB*, 117 F.2d 83 (5th Cir. 1941).

312. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17)(b) (1977)); see *Adrian Daily Telegram*, 214 N.L.R.B. 1103 (1974); *Utility Workers Union*, 203 N.L.R.B. 230 (1973).

vide public information,³¹⁴ refusal to negotiate because of objection to a member of the opposing negotiating team,³¹⁵ negotiating directly with the employees rather than with their certified agent,³¹⁶ and refusal to reduce a total agreement to writing.³¹⁷

There are no Florida court cases defining what issues are bargainable. The two major PERC decisions, *Duval* and *Escambia*, are not particularly helpful, since their primary focus is on the elements of good faith bargaining. In *Duval*, PERC put a noticeable dent in the armor of sovereignty when it observed that equal consideration should be given to the employees' constitutional rights to bargain collectively and the school board's constitutional responsibility for the public schools.³¹⁸

PERC intimated in *Duval* that discipline or discharge of an employee is a term and condition of employment subject to negotiation.³¹⁹ In *Escambia*, PERC held that promotion, layoff, transfer of employees, and wage rates were negotiable as terms and conditions of employment.³²⁰ Other than these two decisions, no court cases identify specifically what subjects are considered negotiable terms of employment.

In both *Escambia* and *Duval*, PERC deliberately avoided establishing guidelines on negotiability. The commission simply held that there is a duty to negotiate what is negotiable. For example, there was ample opportunity in both cases to embrace the mandatory/permissive dichotomy used in the private sector³²¹ and adopted in other public sector jurisdictions.^{321.1} The commission also could

313. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17)(c) (1977)); see *Continental Ins. Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974); *Patent Trader, Inc.*, 167 N.L.R.B. 842 (1967).

314. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17)(d) (1977)).

315. *Id.* (codified at FLA. STAT. § 447.203(17)(e) (1977)); see *Fruit & Vegetable Packers & Warehousemen v. NLRB*, 316 F.2d 389 (D.C. Cir. 1963).

316. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17)(f) (1977)); see *Siskin Steel & Supply Co.*, 160 N.L.R.B. 1038 (1966).

317. Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(17)(g) (1977)); see *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457 (2d Cir. 1973); *NLRB v. International Longshoremen's & Warehousemen's Union*, 451 F.2d 1240 (9th Cir. 1971).

318. 3 F.P.E.R. at 99.

319. *Id.* at 100. But PERC hedged later in the opinion by suggesting that the impact of the disciplinary decision falls within terms and conditions of employment.

320. 2 F.P.E.R. at 98.

321. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342 (1958).

321.1. See, e.g., *West Hartford Educ. Ass'n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Westwood Community Schools, No. 313* (Mich. MERC 1972); *State College Educ. Ass'n v. Pennsylvania Labor Relations Bd.*, 306 A.2d 404 (Pa. Commw. Ct. 1973). See also H. WEL-

have distinguished with more precision the differences between negotiability and the duty to negotiate the impact of non-negotiable issues.³²²

Highlighting the impasse problem tends to be misleading. Putting things in a larger perspective, it is fair to generalize that collective bargaining is working rather well throughout the state, based strictly on the number of contracts which have been negotiated.^{322.1}

LINGTON & R. WINTER, *supra* note 82; Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973); Wollett, *supra* note 82.

322. See, e.g., Board of Educ. v. Associated Teachers of Huntington, Inc., 282 N.E. 2d 109 (N.Y. 1972); West Irondequoit Bd. of Educ., 4 P.E.R.B. ¶ 3070, *aff'd on rehearing*, 4 P.E.R.B. ¶ 3089 (N.Y. PERB 1971), *aff'd*, 346 N.Y.S. 2d 418 (N.Y. App. Div. 1973); City School Dist. of the City of New Rochelle, 4 P.E.R.B. ¶ 3060 (N.Y. PERB 1971).

While PERC has not specifically laid down an impact test in the context of negotiability guidelines, it has by analogy adopted an impact approach in construing the management rights section of PERA. The Act reserves to management unilateral control over agency mission, standards of service, direction and discipline of employees, and layoffs, but permits grievances with respect thereto should such unilateral action "have the practical consequence of violating the terms and conditions of any collective bargaining agreement . . ." FLA. STAT. § 447.209 (1977). In Osceola Classroom Teachers Ass'n, 4 F.P.E.R. ¶ 4066 (PERC 1978), PERC ruled that an employer may not take unilateral action during negotiations or impasse procedures except as to management rights reserved under § 447.209. However, PERC held that even this statutory authorization does not relieve the employer of its obligation "to notify the union of proposed actions affecting bargaining unit members and to thereby provide the union an opportunity to bargain over the effect of the action on the unit members." *Id.* at 147. See also note 319 *supra*.

The five available Florida state worker contracts manifest a variety of negotiated issues. The completed contracts are for the Health Care Unit (Florida Nurses Association), the Law Enforcement Employees (Police Benevolent Association), the Florida State University System (United Faculty of Florida), the Human or Institutional Services Unit (American Federation of State, County & Municipal Employees), and the Professional Unit (American Federation of State, County, & Municipal Employees). There are no published studies available which summarize contract data with respect to cities and municipalities. The author is currently working on a research project involving contract analysis of Florida schoolteacher, fire, and police contracts. Preliminary findings indicate that these public employees have, in fact, negotiated contract provisions on a very large number of items. The completed study will be available through the Florida State University College of Law in late fall, 1978; additionally, it will be on file with the 1978 STAR Grant Reports at the Board of Regents, Collins Building, Tallahassee, Florida.

322.1. In 64 of the 67 school districts in Florida, contracts have been negotiated between the teachers and the board. Of the eight defined state bargaining units, five are presently operating under contract. In connection with the author's study of all public employee contracts, see note 322 *supra*, 40 police and 38 firefighter agreements have been collected and analyzed. Statistics are less defined in the area of blue- and white-collar municipal and county employees; these contracts have proved very difficult to collect. Two community colleges have achieved contracts with their instructional personnel. A number of school districts, besides their agreements with certificated faculty, have negotiated contracts with paraprofessional, clerical, and blue-collar units.

These contracts contain a number of provisions which are, generally, common to all groups. For example, almost all the contracts reviewed in these somewhat diverse occupational groups include provisions covering recognition, dues deduction, grievance procedures, negotiations procedures, leave time, holidays, wage rates, insurance coverage, management rights, no-strike clauses, union/employee rights, and nondiscrimination. In addition to these basic

These contracts bear witness to good faith bargaining on the part of both management and labor. It seems there is more promise than illusion in the implementation of Florida's constitutional grant to public employees of the right to bargain collectively.

PERC's posture of putting off until another day the designation of mandatory subjects of bargaining may well be the wisest course. As experience in the field accumulates and impasse resolution improves, the time may then be ripe for further decisional development of guidelines for negotiability disputes.

Since *Duval* and *Escambia*, there has been a rash of decisions involving unfair labor practices in the context of impasses. One case dealt with unilateral employer action after a contract impasse had been declared, while the others sought clarification of the dual role played by some local governments (e.g., school boards and municipalities) during impasse as public employer/negotiator on the one hand, and legislative body/final arbiter on the other.

In *Pinellas County Police Benevolent Association v. City of St. Petersburg*,^{322.2} after the expiration of certain collective bargaining agreements the city took unilateral action altering conditions of employment related to check-off fee, pool time, grievances, clothing allowance, call back procedure, sick leave, on-duty jury benefits, and insurance. PERC held that such unilateral action, taken after prior contracts expired and impasse arose but before the city had taken final action as the legislative body, constituted an unfair labor practice and refusal to bargain in good faith.

PERC held that after the expiration of a collective bargaining agreement there was a duty to bargain before the employer may unilaterally change conditions of employment. PERC went a step further: it noted that, unlike the NLRA, which allows unilateral action after impasse is reached, PERA contemplates that employer unilateral action may not take place until impasse resolution procedures are concluded by legislative body action.^{322.3} PERC reasoned that, under PERA, a special master (factfinding) proceeding is held after contract impasse has been declared and, during that time, continued negotiations between the parties should be encouraged.

items, the teacher contracts reflected concerns with class size and work load, transfers, student discipline, and academic freedom, while firefighters and police emphasized such additional items as safety procedures, seniority, call back pay and overtime, moonlighting, and residency requirements. Detailed studies of the contract provision will be available in the fall of 1978. See note 322 *supra*.

322.2. 3 F.P.E.R. 205 (PERC 1977).

322.3. *Id.* at 208.

Thus, the employer may not take unilateral action during ongoing impasse proceedings. PERC held that the employer can take unilateral action only when it has acted in its capacity as legislative body at the conclusion of the impasse resolution procedures detailed in PERA.^{322.4}

It follows that the employer must maintain the status quo as to terms and conditions of employment during negotiations and also during the implementation of the impasse procedures. Curiously, PERC distinguished between continuing benefits which must be maintained as part of the status quo and mere cyclical benefits which arise after the prior contract expiration date. *Continuing benefits* were thought to be those that were constant (e.g., insurance, dues deduction fee, grievance procedures, existing salaries); *cyclical benefits*, on the contrary, are those which arise periodically (annual physical examinations, step merit increase on anniversary dates occurring after contract expiration). PERC further noted that grievances over cyclical benefits could not be brought in this hiatus period, even though the grievance procedure itself could not be unilaterally suspended.^{322.5}

In *Madison County Education Association*,^{322.6} the teachers' union and the school board reached a contract impasse resulting in a factfinding hearing and issuance of a special master's report, effectively outlining a recommended contract. Pursuant to statute,^{322.7} a hearing on the recommended report was held by the school board. After incorporating certain recommendations of the school superintendent, the board, sitting as legislative body, approved the contract. Shortly thereafter a dispute arose over whether the salary provision was to be implemented retroactively. The board refused to sign the agreement approved at the first meeting and instructed the school board attorney to draft an addendum clarifying the board's intent to apply salary increases prospectively. At a subsequent meeting the board approved the contract as amended.

The union brought an unfair labor practice charge against the board for refusing to sign the contract as approved at the first meeting. PERC sustained the union's position.^{322.8} PERC held that by

322.4. FLA. STAT. § 447.403 (1977). PERC has ruled that the employer can take unilateral action as to management rights expressly reserved under section 447.209, Florida Statutes, but it still has an obligation to notify the bargaining agent of its actions and to provide an opportunity to bargain over the effect of the action on unit members. *Osceola Classroom Teachers Ass'n*, 4 F.P.E.R. ¶ 4066 (PERC 1978); see note 322 *supra*.

322.5. 3 F.P.E.R. at 209.

322.6. 4 F.P.E.R. ¶ 4006 (PERC 1977).

322.7. FLA. STAT. § 447.403 (1977).

322.8. 4 F.P.E.R. ¶ 4006, at 17.

unilaterally replacing the salary provision mandated by the school board, sitting as the legislative body, and then insisting on the union's acceptance of this additional language as a condition to signing the agreement, the school board failed to bargain in good faith.^{322.9} PERC observed that while the school board had the right, as legislative body, to impose contractual provisions it may deem to be in the public interest, PERA "does not give that employer license to continually revisit the provisions of that labor contract under the guise of 'clarifying its intent.'"^{322.10} PERC went on to state that subsequent questions of contract interpretation are to be resolved by arbitration.

In *Boca Raton Fire Fighters, Local 1560, Inc. v. City of Boca Raton*,^{322.11} the union filed an unfair labor practice charge, alleging that the city—sitting in its capacity as legislative body—must be held to a strict test of fairness, impartiality, and neutrality. In response, the city contended that it was not intended to be a neutral, independent body, but rather, as the public employer, was in an adversarial position as to a union just like any other employer.^{322.12} Impasse had been declared on seven items. A special master was appointed and made recommendations. After a closed meeting among the city council, its chief negotiator, and the city attorney, at which the special master's report was discussed, a compromise with the union was reached on two of the seven items. Thereafter, the city as employer submitted a partial rejection of the factfinding report to PERC.

322.9. *Id.*

322.10. *Id.* See also *Dade County Employees, Local #1363, AFSCME, AFL-CIO*, 4 F.P.E.R. ¶ 4065 (PERC 1978) (South Miami). There the city conducted a hearing as prescribed by FLA. STAT. § 447.403(4)(d) (1977), on November 4, 1975, to take final action on the special master's report regarding impasse items. It accepted some of these recommendations without change and others with slight modifications. Thereafter a proposed contract was drafted. At a meeting on December 2, 1975, held for the purpose of accepting or rejecting the entire proposed contract, the city expressed dissatisfaction with the contractual provision to which it had earlier agreed. The entire contract was rejected, at least in part, because of the city council's subsequent dissatisfaction with its own binding action of November 4 as to certain provisions. PERC held that this was a violation of the duty to bargain in good faith and constituted interference, coercion, and restraint of employee rights under PERA. 4 F.P.E.R. ¶ 4065, at 142.

Dade County Employees held that once all or part of a special master's report (or recommended contract provisions) is adopted in a § 447.403(4)(d) proceeding, this is final action on such issues. Ratification of the legislative body's action, as to these items, is not required by PERA. The legislative body's action may not later be unilaterally changed, nor may the entire contract be subsequently rejected where the controversial provisions were previously approved in a § 447.403(4)(d) hearing. *Dade County Employees* cited with approval *City of Boca Raton*, discussed *infra* in text accompanying notes 322.11-16, and *Madison County Educ. Ass'n*, 4 F.P.E.R. ¶ 4065, at 142.

322.11. 4 F.P.E.R. ¶ 4040 (PERC 1978).

322.12. *Id.* at 86.

Before the city, sitting as a legislative body pursuant to section 447.403(4)(c)-(d) of the Florida Statutes,^{322.13} met to take final action on the items remaining in dispute, a proposed resolution was drafted which purported to adopt conditions of employment for the city's firefighters. It included the collective bargaining agreement agreed to before impasse, those items agreed to during the final round of negotiations following issuance of the special master's report, and the employer's final position regarding the impasse items remaining unresolved. On the eve of the public hearing on the disputed issues, the proposed resolution was delivered to city council members by special courier. Thereafter, the hearing was held, and the city adopted the resolution as previously submitted, after a perfunctory opportunity for the firefighters' union to present its case. The firefighters then brought an unfair labor charge against the city. PERC overruled the PERC general counsel's dismissal of the unfair labor practice charge and ordered the general counsel to issue a complaint alleging that the city violated its duty to conduct a fair and impartial hearing in its capacity as legislative body.^{322.14} PERC said that PERA:

entrusts a legislative body with the right to resolve an impasse between parties by taking final unilateral action *in* the public interest. . . . Notwithstanding its [*sic*] prior involvement as a party to the negotiations, the public employer/legislative body must now consider the interest of the involved public employees in discharging its responsibilities under Section 447.403(4)(d).

[PERA] requires a judicious transition from the posture of public employer to the posture of legislative body.^{322.15}

PERC concluded that the primary measure of the public employer/legislative body's fulfillment of its duties shall be based on the parties' receiving a full and fair opportunity to present their positions and to have those positions fully and fairly considered.^{322.16} However confusing the switching of hats must be in the rushed exodus from the burning house of stalemated negotiations, one must certainly question the propriety of the city's preparing final judgment before the hearing was held.

The very real problems of impasse mixed with the success of

322.13. (1977).

322.14. *Id.* at 89.

322.15. *Id.* at 88-89 (emphasis added).

322.16. *Id.* at 88.

bargained agreements^{322.17} tends to leave Florida's collective bargaining development in a curiously ambivalent posture at present. Borrowing from Professor Cox, in one sense collective bargaining represents a brute contest of economic and political power masked by the gamesmanship of the bargaining process. But the accumulation of negotiated agreements and experience holds forth the prospect of restraint in these power confrontations. This may result from a pragmatic, if not Machiavellian, sense of fear and warped self-interest; but in some cases it is reason, a sense of responsibility, responsiveness to the public interest, and moral principle which generate settlements.^{322.18}

E. Unfair Labor Practices

1. Substantive Provisions

Florida's collective bargaining statute covers unfair labor practices by both employers and employees.³²³ The provisions in PERA parallel similar terms in section 8 of the National Labor Relations Act.³²⁴

Employers are prohibited by PERA from: interfering with, restraining, or coercing public employees in the exercise of their rights under PERA; encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment; refusing to bargain collectively in good faith, or refusing to sign a final agreement which was agreed on with the certified bargaining agent for the bargaining unit; discharging or discriminating against a public employee because he has filed charges or given testimony under PERA; dominating, interfering with, or assisting in the formation, existence, or administration of any employee organization, or contributing financial support to such an organization; and refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent or the employees involved.³²⁵

Similarly, a public employee organization or anyone acting in its behalf, its officers, representatives, or members are prohibited by PERA from: interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed under PERA; inter-

322.17. See note 322.1 *supra*.

322.18. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958). See also *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

323. FLA. STAT. § 447.501(1)-(2) (1977).

324. 29 U.S.C. § 158 (1970).

325. FLA. STAT. § 447.501(1)(a)-(f) (1977).

fering with, restraining, or coercing managerial employees because of their performance of job duties or other activities undertaken in the interests of the public employer; discriminating against an employee because of the employee's membership or nonmembership in an employee organization or attempting to cause the public employer to engage in unfair labor practices; refusing to bargain collectively in good faith with a public employer; and discriminating against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceedings under PERA.³²⁶ Moreover, it is an unfair labor practice for an employee organization to participate in a strike against a public employer by instigating or supporting the strike in any positive manner.³²⁷ It is unlawful, too, to instigate or advocate support for an employee organization's activities from high school students, grade school students, or students in institutions of higher learning.³²⁸ However, PERA, like the National Labor Relations Act, preserves the right of free speech. Expressions or arguments or opinions are not unfair labor practices so long as the speech contains no promise of benefits or threat of reprisal or force.³²⁹

2. Procedures

Whenever an unfair labor practice is charged by an employer, an employee, or an employee organization, PERC conducts a preliminary investigation to determine if there is substantial evidence indicating a prima facie violation.³³⁰ If so, PERC issues a complaint to the charged party, and provides notice and an opportunity for a hearing. If not, the charge is dismissed.³³¹

The party may file an answer to the complaint and by right may appear to "give testimony at the hearing."³³² Other persons may be allowed to intervene in the proceeding and to present testimony.

Testimony taken in PERC proceedings on unfair labor practices must be reduced to writing and filed with the commission.³³³ Upon

326. *Id.* § 447.501(2)(a)-(d).

327. *Id.* § 447.501(2)(e)-(f). *See also* Brevard Community College Fed'n of Teachers, 2 F.P.E.R. 87 (PERC 1976), in which PERC held a local union's election and certification valid even though it was affiliated with a national union which advocated the right to strike by public employees. The local organization's bylaws and charter did not assert the right to strike by public employees.

328. FLA. STAT. § 447.501(2)(f) (1977).

329. *Id.* § 447.501(3); *cf.* National Labor Relations Act § 8, 29 U.S.C. § 158 (1970) (unfair labor practices).

330. FLA. STAT. § 447.503(1) (1977).

331. *Id.* § 447.503(4)(b).

332. *Id.* § 447.503(2).

333. *Id.* § 447.503(4).

notice, PERC may take further testimony or hear argument.³³⁴ But PERC is not bound by judicial rules of evidence in its hearings.³³⁵

Where "substantial and irreparable" injury will result in the absence of temporary relief, PERC may petition a circuit court for appropriate injunctive relief pending the final adjudication of the unfair labor practice by the commission. Thus the court has jurisdiction to grant whatever temporary relief it deems just and proper.³³⁶

The remedial section of PERA also parallels the National Labor Relations Act and is couched in nearly identical language.³³⁷ If PERC finds substantial evidence that an unfair labor practice has been committed, it must state its findings and issue an order requiring the charged party to stop the unfair labor practice. PERC is also authorized "to take such positive action, including reinstatement of employees with or without back pay, as will effectuate the policies of this part."³³⁸ The order may further require the charged party to make reports from time to time showing the extent to which he has complied with the order.

In 1977, the legislature specifically authorized PERC to award litigation costs, attorney fees, and witness fees.³³⁹ Also in 1977, the legislature added a new section to the statute providing for judicial review of PERC's final orders.³⁴⁰ PERC's findings with respect to questions of fact are conclusive if supported by substantial evidence on the record.³⁴¹ However, no order of PERC may require the rein-

334. *Id.*

335. *Id.* § 447.503(3)(a).

336. *Id.* § 447.503(3)(b).

337. *Id.* § 447.503; *cf.* National Labor Relations Act § 10, 29 U.S.C. § 160 (1970) (remedial portions of the Act).

338. FLA. STAT. § 447.503(4)(a) (1977). Florida courts have shown a tendency to construe this section broadly. *See* text accompanying note 289.2 *supra*.

339. Act of June 24, 1977, ch. 77-343, § 19, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.503(4)(c) (1977)).

340. Act of June 24, 1977, ch. 77-343, § 20, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.504 (1977)). The amendment is essentially the same as the previous § 447.503(5)-(6) but permits a party, as well as PERC, to apply to the court for enforcement of a PERC order or for injunctive relief. Such petitions are exempt from the requirements of FLA. STAT. § 120.69(1)(b)(1) (1977), which provides that no such action may be commenced "[p]rior to 60 days after the petitioner has given notice of the violation of the agency action to the head of the agency concerned, the attorney general, and any alleged violator of the agency action."

341. FLA. STAT. § 447.504(3) (1977). This language substantially tracks the language of the National Labor Relations Act § 10 (e)-(f), 29 U.S.C. § 160(e)-(f) (1970). For the standard of judicial review of an administrative determination, see *Universal Camera v. NLRB*, 340 U.S. 474 (1951). *See also* *Pasco County School Bd. v. Florida PERC*, 353 So. 2d 108 (Fla. 1st Dist. Ct. App. 1977), discussed in note 342 *infra*, which essentially follows *Universal Camera* and may be considered the leading Florida authority on the matter with regard to PERA.

statement of any individual as an employee who has been suspended or discharged for cause.³⁴²

342. FLA. STAT. § 447.503(4)(d) (1977). Several PERC decisions have dealt with discrimination. In *Columbia County Transp. & Maintenance Workers Ass'n*, 3 F.P.E.R. 58 (PERC 1977), a refrigeration technician was solicited by other employees to head their newly formed union; within a short time he was suspended (and then fired) for "incompetence." He was told by his employer that "the Board is not ready for collective bargaining this year, maybe next year." *Id.* at 60.

PERC noted that for a discrimination charge to stand, "an examination of the employer's motivation underlying the alleged discriminatory conduct must be undertaken. If such examination reveals that the employer has, in fact, illegally discriminated against an employee, it must be determined that such discrimination was motivated by anti-union sentiments." *Id.* at 61. The commission observed, however, that "it is not logical to always require specific proof of such prohibited intent. When the natural consequences of the employer actions tend to encourage or discourage membership in an employee organization, the employer will be presumed to have intended such consequences which justifiably and foreseeably flow from its actions." *Id.*

The creation of this presumption was a significant step toward enforcing basic bargaining rights of public employees. Among other remedies, PERC ordered the employee reinstated with back pay and interest from the date of his suspension. See *International Bhd. of Electrical Workers*, No. 8H-CA-763-0143 (Fla. PERC Oct. 4, 1977); *Dana E. Pratt & Lloyd A. Perry*, 3 F.P.E.R. 186 (PERC 1977); *William E. Burrows*, 3 F.P.E.R. 179 (PERC 1977); *Pasco Classroom Teachers Ass'n*, 3 F.P.E.R. 9 (PERC 1976).

The First District Court of Appeal reviewed and affirmed PERC's decision in *Columbia County Bd. of Pub. Instruction v. PERC*, 353 So. 2d 127 (Fla. 1st Dist. Ct. App. 1977), directing PERC, however, to allow the employer credit for unemployment compensation benefits received by the mechanic before his reinstatement. The court also held that an employer commits an unfair labor practice "when its motive for discharging an employee is to punish for or discourage organizational activity and the employee would be retained but for his union activity." *Id.* at 130. The court said where there is proof that an impermissible motive was one of two or more factors in the employer's decision to terminate, the employer must then carry the burden of proving that it would have reached the same decision without considering the protected activity, thus adopting the rationale of *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). The court noted that the record in *Columbia* would only support the conclusion that the school board would have retained the technician but for his organizational activities. *Id.*

In *Pasco Classroom Teachers Ass'n*, 3 F.P.E.R. 9 (PERC 1976), the school board discharged two teachers and refused tenure to another, allegedly on the basis of their active union participation. All the teachers had previously received satisfactory or outstanding evaluations, and two of them had been selected as teacher of the year in their respective schools. PERC pointed out that the language of PERA prohibiting employer discouragement of employee bargaining activities by discriminating in regard to hiring, tenure, or other conditions of employment is very similar to that of the National Labor Relations Act, as well as other states' bargaining acts, and noted that it felt "compelled" to consider precedents adhered to by the NLRB and the courts in interpreting Florida's PERA. *Id.* at 13. PERC then went on to hold that the discharges and denial of tenure in *Pasco* were motivated by the union activities of the teachers and thus were violative of the statute. *Id.* at 14.

On review, in *Pasco County School Bd. v. Florida PERC*, 353 So. 2d 108 (Fla. 1st Dist. Ct. App. 1977), the court held that in cases of allegedly discriminatory discharges, it is first up to the employee to prove his conduct was protected activity and was a motivating factor in the action taken against him. But the court noted that PERC erroneously stopped its consideration at that point in *Pasco*; what it should have then done was determine whether the board could meet its burden of showing "whether the decision affecting the discriminatees would have been reached despite the presence of a non-permissible reason." *Id.* at 121.

3. Other Unlawful Acts

A section of PERA entitled "other unlawful acts" must be read with the unfair labor practice provisions.³⁴³ The unlawful acts section provides that employee organizations, or any persons acting on their behalf, may not solicit public employees during the working hours of any employee who is involved in the solicitation. In addition, union workers may not distribute literature during working hours in areas where the actual work of public employees is performed, such as offices, warehouses, schools, police stations, fire stations, and any similar public installations. (However, the statute warns that "this section shall not be construed to prohibit the distribution of literature during the employee's lunch hour, or in such areas not specifically devoted to the performance of the employee's official duties.") Finally, union organizers may not instigate or advocate support for an employee organization's activities from high school or grade school students during classroom time.³⁴⁴

In addition, the unlawful acts section prohibits employee organizations from paying any fines or penalties assessed against individuals pursuant to the provisions of PERA—either directly or indirectly.³⁴⁵ The Florida circuit courts are given jurisdiction to enforce

Here, the evidence on the record was not as clear as in *Columbia*. The court vacated that portion of PERC's order finding an unfair labor practice with regard to the discriminatee and remanded the case to the hearing officer for an appropriate determination of the question, in keeping with the principles of *Mount Healthy* and the "but for" or "moving cause" tests espoused in *Columbia*. *Id.* at 122.

In a recent case involving the firing of two deputies by the Leon County sheriff, the Department of Administrative Hearings' officer found that the discharge was "discriminatorily motivated and undertaken based on anti-union sentiments," and that the reasons assigned by the employer were "merely a pretext." Perry Lawrence, No. 77-1082P, slip op. at 7-8 (Fla. DOAH Oct. 11, 1977). The hearing officer ordered the employer to stop its unlawful practices and reinstate the two employees with back pay. A hearing before PERC is pending on the case. It should be noted that in *Murphy v. Mack*, No. 51,025 (Fla. March 2, 1978), the Florida Supreme Court held that a deputy sheriff is not a public employee within the meaning of PERA. *See* note 71 *supra*.

The position taken by the First District Court of Appeal in *Columbia* and *Pasco*, derived in large part from the language of the United States Supreme Court in *Mount Healthy*, may be a step removed from traditional labor law doctrine, which has held that where an improper motive for an employee discharge is present, an unfair labor practice has been committed, entitling the employee to reinstatement and back pay. *See also* *Muskego-Norway Consol. Schools v. Wisconsin Employment Relations Bd.*, 151 N.W.2d 617 (Wis. 1967), in which the Wisconsin Supreme Court applied the private labor law principle that "an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him." *Id.* at 628. *See generally* Donald E. Leon, 1 P.E.R.B. ¶ 800 (N.Y. PERB 1968); R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 137-44 (1976).

343. FLA. STAT. § 447.509 (1977).

344. *Id.*

345. *Id.*

the provisions of this section by injunction and contempt proceedings. A public employee who is convicted of a violation of any provision of this section may be discharged or otherwise disciplined by his public employer, notwithstanding further provisions of law or the provisions of any collective bargaining agreement.³⁴⁶

Relatively few court cases have construed PERA's provisions on unfair labor practices. *City of Bartow v. PERC* dealt with the question of whether investigatory documents in cases involving charges of unfair labor practices were public records subject to disclosure under Florida's Public Records Act.³⁴⁷ The First District Court of Appeal held that the records, affidavits, papers, and notes in the custody of PERC or its investigator were "public records" subject to disclosure under the Act. However, the court also held that it would be appropriate for PERC and its investigatory agent to postpone public disclosure of such documents for a reasonable period until PERC or its agent had either dismissed the charge or had found substantial evidence of a prima facie violation.³⁴⁸

There are two significant court cases reviewing PERC decisions which have addressed the problem of employment discrimination for union activity remedied by orders for employee reinstatement with back pay. The prohibition of such orders in cases involving dismissal for cause probably would not be applied to overrule PERC where there was a showing of unlawful discrimination against an employee for exercising his constitutional right to collective bargaining and where such employee would not have been dismissed "but for" his union activity.³⁴⁹

Reinstatement with back pay is essential to preserve the free exercise of organizational rights where the reason for dismissal was unlawful discrimination for exercising those rights. This has been the majority rule in both the private and public sectors.³⁵⁰ A contrary rule would defeat the purpose of PERA. The restrictive language dealing with reinstatement for cause should not be read as restricting the otherwise broad authority of PERC to remedy violations "and to take such positive action, including reinstatement of

346. *Id.*

347. 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976).

348. In addition, public disclosure is not required during a nonadversary preliminary investigation. But it is required once PERC dismisses the charges or finds substantial evidence of a violation. *Id.* at 1003. See also *School Bd. v. PERC*, 334 So. 2d 582 (Fla. 1976) (Marion County).

349. For a discussion of discrimination cases, see note 342 *supra*.

350. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970). See also note 342 *supra*.

employees . . . as will effectuate the policies" of the Florida statute.³⁵¹

Few court cases have dealt with the application of either the PERA section on unfair labor practices or the section on "other unlawful acts." Those that do focus primarily on the relationship between those sections and the Public Records Act.³⁵² Predictably, the PERC decisions in such cases generally cite NLRB and federal court decisions under section 8 of the National Labor Relations Act, and PERC generally follows NLRB precedent in rulings on organizational unfair labor practices. For example, PERC decisions which deal with allegations of campaign misrepresentation constituting violations of sections 447.501(1)(a) or 447.501(2)(b) somewhat parallel NLRB precedent.^{352.1}

351. FLA. STAT. § 447.503(4)(a) (1977).

352. See *City of Bartow v. PERC*, 341 So. 2d 1000.

352.1. *Laborers Int'l Bhd. of N. America*, No. 517, 2 F.P.E.R. 84 (PERC 1976) (holding under *Hollywood Ceramics*, 140 N.L.R.B. 221 (1962), that rule exaggerations and inaccuracies are not grounds for setting election aside). See also *Laborers Int'l Union Local #666*, 2 F.P.E.R. 145 (PERC 1976); *Public Serv. Employees of Jacksonville*, 2 F.P.E.R. 75 (PERC 1976); *Town of Palm Beach Firefighters Local No. 1866*, 2 F.P.E.R. 41 (PERC 1976) (upholding 24-hour rule and citing with approval *Peerless Plywood Co.*, 33 L.R.R.M. 1151 (1953), but refusing to apply rule to facts of case on theory that breach of 24-hour rule did not destroy laboratory conditions); *Teamsters Local 991*, 1 F.P.E.R. 34 (PERC 1975) (public employer failed to meet its burden of showing the union misstatements to be so persuasive as to destroy laboratory conditions necessary to conduct a fair election) (citing *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)); *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

Hollywood Ceramics has recently been overruled. See *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 190 (1977) (holding elections will no longer be set aside solely on the basis of misleading statements). In practical effect, PERC had been reaching the same result on the rationale that the charging party had not successfully carried the burden of showing that the misstatements affected the outcome of the election or had not destroyed the laboratory conditions. The alleged misrepresentations were simply characterized as campaign puffing.

In *Fort Lauderdale City Employees Benevolent Ass'n, Inc.*, 4 F.P.E.R. ¶ 4167 (PERC 1978), the city alleged that the union (AFSCME) made a series of misrepresentations during a representation election: it stated that AFSCME would establish a separate local bargaining unit and thus allow a separate contract with the city; it indicated certain civil service benefits were protected by a gubernatorial executive order, when in fact such protection applied only to state workers; it asserted that by law no existing civil service benefits could be lost through collective bargaining, and thus employees would only gain; it declared that AFSCME had found approximately \$13.7 million in the city budget available for salary increases which was being concealed by the city, notwithstanding the fact that the figure included substantial federal funds which could not be used for salaries. *Id.*

PERC decided with this case to limit its regulation of free speech in unfair labor practice cases, analogizing its approach to federal and Florida regulation of political campaigns. See 18 U.S.C. §§ 594, 597 (1976); FLA. STAT. § 104.061 (1977). Essentially, these laws make it a crime to threaten or promise a benefit to influence a vote in a state or federal election. Section 447.501(1)-(2), as tempered by the free speech proviso in § 447.501(3), is the basis which PERC will use in the future to evaluate the effects of campaign statements on the validity of representation elections. PERC seemingly also approved restrictions on campaign statements by either party within 48 hours of the election. *Fort Lauderdale*, 4 F.P.E.R. at 322.

PERC noted that employee organizations will be allowed "considerably" more leeway than

There is a basic difference which might arise between the approach of the NLRB and that of PERA, section 447.501, concerning solicitation and distribution rules.³⁵³ Under 447.501-type violations, the NLRB decisions distinguish between solicitation and distribution rules applicable to employee organizers as opposed to outside union organizers.³⁵⁴ A strong argument can be made that under PERA no such distinction is justified by the "other unlawful acts" section when read with the unfair labor practice provision, section 447.501. The "other unlawful acts" language applies to "employee organizations" or "any persons," and it specifies that the section shall not be construed to prohibit distribution during the lunch hour or in nonwork areas. Clear in its application to nonemployee organizers as well as employee organizers, it seems, then, that under PERA outside nonemployee union organizers would be free to enter the public employer's premises and distribute literature during the lunch hour in nonwork areas. These sections appear less restrictive than the NLRB decisions, which are not as hospitable to nonemployee organizers.³⁵⁵

There are no reported court or PERC decisions dealing squarely with domination of employee organizations.

F. Strike Provisions

Strikes by public employees are prohibited by the Florida Consti-

employers, citing the following cases with approval: NLRB v. Gissell Packing Co., 395 U.S. 595 (1969); Acme Wire Prods. Corp., 224 N.L.R.B. 701 (1976); The Smith Co., 192 N.L.R.B. 1098 (1971). *Fort Lauderdale*, 4 F.P.E.R. at 322. In abandoning the restrictive approach of Hollywood Ceramics, 140 N.L.R.B. 221 (1962), in favor of a fuller implementation of the free speech proviso of PERA, PERC suggested that determining the effect of an alleged misrepresentation on an election after the fact was too speculative to outweigh the policy reasons favoring protection of all campaign speech except that which either promised a benefit or, to the contrary, was threatening or coercive.

For articles which explain the empirical basis and possible rationale for the overselling of *Hollywood Ceramics*, see J. Getman & S. Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976); J. Getman, S. Goldberg, & J. Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975).

353. FLA. STAT. (1977).

354. Cf. NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956) (employer must not interfere in employees' exercise of their own rights; but no such obligation is owed nonemployee organizers); Republic Aviation v. NLRB, 324 U.S. 793 (1945) (upholding NLRB's finding invalid a company prohibition of union solicitation by employees).

355. In *Town of Palm Beach Firefighters Local No. 1866*, 2 F.P.E.R. 41 (PERC 1976), PERC held that distribution of literature and solicitation of memberships among firefighters before shifts began and during lunch periods did not violate § 447.509. PERC rejected a claim by the town that firefighters were on call 24 hours a day and therefore on duty 24 hours a day, and noted that the employer had traditionally recognized lunch and dinner hours as free time for the firefighters. See also note 354 *supra*.

tution,³⁵⁶ and PERA has antistrike provisions³⁵⁷ containing severe penalties for violations.³⁵⁸ The statute provides too that it is an unfair labor practice to participate in a strike "against the public

356. FLA. CONST. art. I, § 6.

357. FLA. STAT. § 447.505 (1977) provides that "[n]o public employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike." The 1977 amendments provide a broad definition of "strike":

"Strike" means the concerted failure [of employees] to report for duty; the concerted absence of employees from their positions; the concerted stoppage of work [by employees]; the concerted submission of resignations [by employees]; the concerted abstinence in whole or in part by any group of employees from the full and faithful performance of the duties of employment with a public employer for the purpose of inducing, influencing, condoning, or coercing a change in the terms and conditions of employment or the rights, privileges, or obligations of public employment, or participating in a deliberate and concerted course of conduct which adversely affects the services of the public employer; the concerted failure [of employees] to report for work after the expiration of a collective bargaining agreement; and picketing in furtherance of a work stoppage. The term "strike" shall also mean any overt preparation including but not limited to the establishment of strike funds with regard to the above listed activities.

Act of June 24, 1977, ch. 77-343, § 6, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.203(6) (1977)).

358. FLA. STAT. § 447.507(2)-(7) (1977). This section provides both severe penalties and rather flexible procedural relief to enjoin a strike. Thus, either PERC or the public employer may initiate an injunction in the appropriate circuit court to enjoin a strike or an imminent strike.

If the strikers do not comply with the injunction, contempt proceedings may follow. A fine may be imposed against the union as deemed appropriate by the court, but it may not exceed \$5,000. In addition, union officials found in contempt may be fined not less than \$50 nor more than \$100 for each calendar day of the strike. A union may also be liable for any damages suffered by the public employer. A judgment for damages may be enforced against the union's fees, dues, or check-off. Actions for money damages may not be brought until other proceedings before PERC at the time of the strike have been fully adjudicated. In determining the amount of damages, the trier of fact may consider in mitigation any action or inaction by the public employer which provoked or tended to provoke the strike and any damages previously awarded by PERC.

If PERC, after notice and hearing conducted according to its rules, determines that an employee has violated the antistrike prohibition, it may order termination of employment. The employee may only be reemployed for a six-month probationary period, during which time the employee must serve without tenure. Furthermore, the employee thus reemployed may not have his salary increased until one year after his reemployment.

If the commission, in accordance with its own rules, finds that an employee organization has violated the no-strike provision of § 447.505, Florida Statutes (1977), it can suspend or revoke its certification as a bargaining agent. Additionally, PERC can revoke the employee organization's right to dues deduction and collection. PERC can also fine the employee organization up to \$20,000 per day for each day of the strike or fine the organization an amount equal to the approximate cost of the strike (even though in excess of \$20,000 per day). When collected, such fines immediately accrue to the public employer and must be used to replace those services denied the public as a result of the strike.

When determining the amount of damages to be awarded to the public employer, the commission must take into consideration any action or inaction by the public employer or its agents which may have provoked or tended to provoke the strike. Orders issued by PERC under this section may be reviewed and enforced in the district courts of appeal.

employer by instigating or supporting, in any positive manner, a strike."³⁵⁹

Despite the unfair labor practices provisions in PERA, PERC has no statutory authority to institute an unfair labor practice proceeding. This can be done only by the employer, the employee organization, or the aggrieved employee.³⁶⁰ However, section 447.505 of the Florida Statutes contains no similar limitations,³⁶¹ and the commission or any public employer whose employees are involved or whose employees may be affected by a strike may file suit in the appropriate circuit court. After a hearing, the circuit court "shall issue a temporary injunction enjoining the strike."³⁶²

Since the enactment of PERA in 1974, only one strike by public employees has occurred in Florida, although there have been several minor disputes involving sick-outs, strike votes, and minor work stoppages.³⁶³ In 1975, teachers in Broward County represented by the Broward County Classroom Teachers Association went on strike. PERC obtained an injunction in circuit court pursuant to section 447.507 of the Florida Statutes,³⁶⁴ and the strike ended.³⁶⁵ The public employer had not filed a charge against the union. The union protested the injunction in circuit court, contending that PERC was powerless to act in the absence of a charge of unfair labor practice by the employer.

The circuit court disagreed, as did the First District Court of Appeal. The district court stated on appeal that "[i]f the Commission could act to enforce the strike prohibition only upon the filing of a charge by a public employer, a public employer by non-action or agreement could effectively emasculate the constitutional and statutory prohibitions against strikes."³⁶⁶ The court made clear that section 447.507 grants authority to the commission to initiate proceedings of its own accord both to enjoin violations of section 447.505 and to impose appropriate sanctions under section 447.507.³⁶⁷

On March 17, 1977, PERC and the teachers' union entered a settlement stipulation by which the union agreed to end the strike,

359. FLA. STAT. § 447.501(2)(e) (1977).

360. *Id.* § 447.503(1).

361. (1977). For the text of § 447.505, see note 357 *supra*.

362. FLA. STAT. § 447.507(2) (1977).

363. These incidents were quickly resolved at the local levels without any involvement by PERC.

364. For a discussion of strike penalties, see note 358 *supra*.

365. See *Broward County Classroom Teachers Ass'n v. PERC*, 331 So. 2d 342 (Fla. 1st Dist. Ct. App.), *cert. denied*, 341 So. 2d 1080 (Fla. 1976).

366. *Id.* at 344.

367. *Id.*

to post notices prohibiting its members from engaging in strike activity and informing them that no dues would be accepted during July and August, 1977, to pay a \$40,000 fine (the statutory maximum for a two-day strike), and to pay the fine before restoration of its certification.³⁶⁸ The union complied with all of the terms. Thus, the first challenge to PERA's antistrike provisions was met, and strict penalties were imposed. Whether these stiff penalties will discourage strikes by public employees in the future remains to be seen.

G. *Public Access to the Collective Bargaining Process*

1. *Public Records Act*

Two Florida appellate cases have explored the relationship between the Public Records Act³⁶⁹ and PERA. In both cases, the courts sought an accommodation of the two laws.

In *School Board v. PERC*, the Florida Supreme Court considered employer access to employee authorization cards.³⁷⁰ A union filed a petition with PERC seeking certification as the bargaining agent for certain school board employees in Marion County. The petition was accompanied by dated authorization cards signed by at least thirty percent of the employees in the proposed unit, as required by section 447.307(2) of PERA.³⁷¹ Ten days later the school board wrote to PERC, denying that the thirty percent requirement had been met and requesting access to the authorization cards (then in PERC's possession). The school board gave no reasons for the denial or the request.³⁷² PERC refused access because of the need to protect employee confidentiality and the need to prevent a possible "chilling effect" on the exercise of the bargaining right.³⁷³ The school board then petitioned for a writ of mandamus, arguing that the Public Records Act provides that all documents received by a public agency "shall at all times be open for a personal inspection by any person."³⁷⁴

The Public Records Act contains no express exemptions for collective bargaining. However, it does provide that certain records may be exempt by provision of "general or special law."³⁷⁵ The court in

368. PERC, 3 F.P.E.R. 121, 122 (PERC 1977) (Broward County Classroom Teachers Ass'n).

369. FLA. STAT. §§ 119.01-.12 (1977).

370. 334 So. 2d 582 (Fla. 1976) (Marion County).

371. FLA. STAT. (1977).

372. 334 So. 2d at 583.

373. *Id.* & n.3.

374. FLA. STAT. § 119.01 (1977).

375. *Id.* § 119.07(2)(a).

the Marion County case relied on a provision of PERA to limit disclosure of the authorization cards. The court held that under the applicable PERA language there is no unfettered public right to access to the authorization cards as public records. For example, an employer is entitled to access only if he alleges in his request that cards were obtained by "collusion, coercion, intimidation, or misrepresentation" ³⁷⁶

Since no such allegation was made, the court concluded that PERC was correct in withholding access. But the court also held that the school board could have had access to the cards if it had entered a good faith allegation based on one of the grounds enumerated in section 447.307(2). ³⁷⁷ In response to PERC's concern that such access would have a chilling effect on organizational rights, the court said that the unfair labor practices section of PERA would suffice to protect the rights of the employees who had signed the cards. The court noted as well that stronger remedies, such as bargaining orders, would also be available if lesser remedies under PERA proved insufficient. ³⁷⁸

In *State ex rel. City of Bartow v. PERC*, ³⁷⁹ the documents sought under the Public Records Act were compiled by the PERC investigator during a preliminary investigation of charges of unfair labor practices. ³⁸⁰ The City of Bartow argued that the investigation materials were public records and therefore available to any person desiring to inspect them "at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee." ³⁸¹ PERC protested that disclosure would hamper its investigations of unfair labor practices and would increase opportunities for coercion of employees by public employers. ³⁸²

The court held that the investigatory materials were public records. ³⁸³ They were not exempted from disclosure by PERA. Yet the court was responsive enough to PERC's argument to hold that the "reasonable times, reasonable conditions" requirement in the Public Records Act was not met until PERC either dismissed a charge as groundless or determined that there was substantial evidence of a *prima facie* violation. ³⁸⁴ At that point, the investigatory materials

376. *Id.* § 447.307(2).

377. 334 So. 2d at 585.

378. *Id.*

379. 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976).

380. Under FLA. STAT. § 447.503(1) (1977), PERC must make a preliminary investigation.

381. FLA. STAT. § 119.07(1) (1977).

382. 341 So. 2d at 1002.

383. *Id.*

384. *Id.* at 1003.

would normally be open to public access.

The *Bartow* court explained that preliminary investigations are "nonadversarial means of winnowing groundless charges" which should not be delayed or disrupted by demands for disclosure of investigatory materials.³⁸⁵ As soon as the process becomes adversarial, however, disclosure is required. If a preliminary investigation is proceeding too slowly and thus postponing disclosure unreasonably, an application for disclosure may be submitted to PERC. The PERC determination regarding the application is then reviewable by a district court of appeal.³⁸⁶

As in the Marion County school board case, the *Bartow* court used a pragmatic approach to achieve a reasonable, workable, and fair result. In both cases, the court recognized the unique nature of labor law in the public sector.^{386.1}

2. *Public Labor in the Sunshine*

Some aspects of collective bargaining by governmental employees are directly affected by Florida's "Sunshine Law." The "Government in the Sunshine Law," enacted in 1967,³⁸⁷ provides generally that all meetings of any governmental body at which official action is taken must be open to the public. The minutes of all meetings must be promptly recorded and made available for public inspection. Any person violating the Sunshine Law is guilty of a second-degree misdemeanor.³⁸⁸

Florida courts initially construed the term "meeting" liberally. In 1969, in *Times Publishing Co. v. Williams*, the Second District Court of Appeal held that every step in the decisionmaking process leading to formal action is an "official act."³⁸⁹ That same year, the Florida Supreme Court broadened this view in *Board of Public Instruction v. Doran*.³⁹⁰ The meetings at issue were executive school board sessions held to inform staff members about matters to be considered at subsequent, more formal meetings. The public and the press were barred because no "formal action" was taken during

385. *Id.*

386. See FLA. STAT. § 120.68 (1977) (Administrative Procedure Act). The act entitles a party who is adversely affected by final agency action to judicial review of that action.

386.1. For a more detailed consideration of the *Bartow* and *Marion* cases, see 6 FLA. ST. U.L. REV. 149 (1978).

387. Act of July 12, 1967, ch. 67-356, § 1, 1967 Fla. Laws 1148 (current version at FLA. STAT. § 286.011 (1977)).

388. FLA. STAT. § 286.011 (1977). For recent developments in the interpretation of the Sunshine Law, see 6 FLA. ST. U.L. REV. 199 (1978).

389. 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969).

390. 224 So. 2d 693 (Fla. 1969).

the sessions. The court held that the new law applied because some of the matters discussed *might* be the basis for *foreseeable* action by the board.³⁹¹

In *Bassett v. Braddock*, the first public labor case (pre-PERA) to reach the Florida Supreme Court on the "sunshine" issue, the court deviated from the *Times* and *Doran* standards.³⁹² The court framed the issues as follows: (1) whether labor negotiators employed by the board in preliminary or tentative teacher contract negotiations with the teachers' representatives could negotiate outside of public meetings without being in violation of the Sunshine Law; and (2) whether the board could instruct and consult with its labor negotiators in private without being in violation of the Sunshine Law.³⁹³

The *Bassett* court answered the first question by holding that the discussions did not qualify as meetings and thus were exempt from the Sunshine Law. This decision was based on two interrelated theories. First, a constitutional exception shielded the bargaining sessions from mandatory public access. Second, a pragmatic theory recognized the "uncontroverted testimony by respectable national authorities in the field" that meaningful collective bargaining would be destroyed if fully publicized at every step of the negotiations.³⁹⁴

The court noted first the language of the Sunshine Law providing that meetings shall be open to the public "except as otherwise provided in the Constitution."³⁹⁵ Because the right to organize and bargain collectively is guaranteed by the constitution and because the exercise of that right might be impaired if preliminary negotiations were open to the public, the court concluded that such sessions were exempt from the Sunshine Law on constitutional grounds. The *Bassett* court described article I, section 6 of the Florida Constitution as a "protective umbrella" for public employee bargaining rights which should be used to prevent the "sunburn" that could result from the "intensity" of the "sunrays" emanating from the Sunshine Law. The constitution provided a "polaroid filter" to protect "preliminary skirmishing" from "damaging 'ultra violet rays.'" ³⁹⁶

While offering this extended metaphor, the court noted that the purposes of the Sunshine Law were not being frustrated by its decision. Ultimately, the contract, and hence the policy discussions re-

391. *Id.* at 700.

392. 262 So. 2d 425 (Fla. 1972).

393. *Id.* at 426.

394. *Id.* at 426-27.

395. FLA. STAT. § 286.011(1) (1977).

396. 262 So. 2d at 426.

lating to it, would have to be approved at a public meeting held by the employer "in the sunshine." Thus, the statutory requirements would be met even though preliminary negotiations might take place in private.³⁹⁷ The court distinguished prior decisions by classifying preliminary negotiations as discussions and deliberations which often "take place beyond the veil of actual 'meetings' of the body involved."³⁹⁸ The court reasoned that negotiating sessions are not meetings, but rather are preliminary "discussions" which may never result in official or foreseeable action.³⁹⁹

The second issue—whether the board could instruct and consult with its negotiator privately—was decided in favor of privacy. The court reasoned that public employers should have the same advantages as the public unions during the negotiating process. And certainly one advantage for the unions is private strategy sessions. The employer would not be "hiding" anything in such sessions, the court observed. Rather, it would merely be trying to get the best bargain available for the public. The court concluded that the employer should be able to prepare for the bargaining table under the same rules and under the same conditions as the employees.⁴⁰⁰

The unique treatment given to collective bargaining by this judicial interpretation can be appreciated more fully upon examination of the subsequent cases and attorney general opinions in areas other than labor negotiations. In *Bigelow v. Howze*, two of five city commissioners went on an out-of-state factfinding trip.⁴⁰¹ The Second District Court of Appeal held that a discussion by the commissioners in their hotel concerning a contract award was a violation of the Sunshine Law. In another case, the Florida Supreme Court affirmed a finding by the Fourth District Court of Appeal that a planning commission of lay citizens was subject to the law although the citizens functioned only in an advisory capacity.⁴⁰²

In yet another case, the supreme court held that a discussion of a student's suspension by a school board should take place in the sunshine.⁴⁰³ The court reasoned that since the statute was enacted for the public's benefit, it should be interpreted most favorably to the public—that is, in favor of disclosure.⁴⁰⁴ In addition, the court

397. *Id.* at 427.

398. *Id.*

399. *Id.*

400. *Id.* at 428.

401. 291 So. 2d 645 (Fla. 2d Dist. Ct. App. 1974).

402. *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Fla. 4th Dist. Ct. App. 1973), *aff'd sub nom. Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

403. *Canney v. Board of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973).

404. *Id.*

refused to grant an exemption even though the legislative body acted in a quasi-judicial manner.⁴⁰⁵ Similarly, the Florida attorney general expressed his opinion that employee grievance committee hearings⁴⁰⁶ and luncheon meetings between individual school board and staff members⁴⁰⁷ can violate the Sunshine Law, if held privately.

It should be noted that PERA was enacted after *Bassett* and therefore may qualify the holding in that case. Section 447.605(1) of PERA exempts discussions "relative to" collective bargaining between the chief executive officer and the legislative body of the employer.⁴⁰⁸ This is consistent with the court's resolution of the second issue in *Bassett*.⁴⁰⁹ PERA specifically provides that such discussions shall be exempt from the Sunshine Law. However, under PERA, negotiations apparently must be in the sunshine. Thus, section 447.605(2) of the Florida Statutes, as enacted in 1974, provided that "[t]he collective bargaining negotiations between a chief executive officer and a bargaining agent *shall not be exempt* from § 286.011, Florida Statutes."⁴¹⁰

Section 447.605(1) was interpreted in an opinion by the attorney general which adopted a rule of strict construction, to mean that only public employer discussions relating to actual negotiations were exempt from the Sunshine Law under section 447.605(1), and that policy matters such as the "stance" or "attitude" an employer generally intends to adopt toward unionization, prospective collective bargaining, general personnel policies, "or the like" should be held in the sunshine.⁴¹¹ Curiously enough, this opinion did not cite or otherwise discuss *Bassett*. Nevertheless, this interpretation by the attorney general has never been challenged or reconciled in court. In 1977, section 447.605(2) was amended to read: "The collective bargaining negotiations between a chief executive officer, or his representative, and a bargaining agent *shall be in compliance with* s. 286.011."⁴¹² In view of the 1977 amendment, a strong argument can be made that *Bassett* is still good law and therefore negotiations need not be public. The court viewed its decision in *Bassett* as in compliance with the Sunshine Law:

405. *Id.*

406. 1974 FLA. OP. ATT'Y GEN. 074-40.

407. *Id.* at 074-197.

408. FLA. STAT. (1977).

409. 262 So. 2d at 426.

410. Act of May 30, 1974, ch. 74-100, § 3, 1974 Fla. Laws 134 (current version at FLA. STAT. § 447.605(2) (1977)) (emphasis added).

411. 1975 FLA. OP. ATT'Y GEN. 075-48.

412. Act of June 24, 1977, ch. 77-343, § 23, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.605(2) (1977)) (emphasis added).

The public's representatives must be afforded at least an equal position with that enjoyed by those with whom they deal. The public should not suffer a handicap at the expense of a purist view of open public meetings, so long as the ultimate debate and decisions are public and the "official acts" and "formal action" specified by the statute are taken in open "public meetings." This affords the adequate and effective protection to the public on the side of the "right to know" which was intended.⁴¹³

The potential conflict between section 447.605 of PERA and *Bassett* has not been brought before a Florida appellate court for definitive adjudication.

It is not clear whether discussions by public employers about positions, attitudes, or policies relative to collective bargaining (for example, whether to run a counterorganizational campaign against the union), have in actual practice been held in the sunshine. It is doubtful whether other public employers have taken the attorney general's restrictive view of such discussions. However, the contract negotiation sessions themselves *have* been held in the sunshine. The general attitude seems to be that, despite the 1977 amendment to section 447.605(2), actual negotiations will be in the sunshine. A good argument can be made to the contrary based on the statute. But the political facts of life in Florida are such that neither public officials nor unions are likely to align themselves against bargaining in the sunshine absent a clear and unequivocal statutory exemption.

There are no conclusive studies about the effectiveness of "goldfish bowl" bargaining. Donald Magruder, the Executive Director of the Florida School Boards Association, has assessed some of the advantages and disadvantages of opening collective bargaining to public scrutiny.⁴¹⁴ The primary benefits he identified were increased public awareness of the functions and problems of local government and opportunity for the press and the public to see the positions, arguments, and attitudes of both sides. Further, with the public in attendance, both sides are constantly reminded of the source of the money over which they are negotiating. The disadvantages cited by Magruder were that collective bargaining sessions can

413. 262 So. 2d at 427 (footnotes omitted). Note that PERA requires that all contracts be approved by the legislative body under § 447.309(1), Florida Statutes (1977), and that impasse resolution be approved by the legislative body under § 447.403. Legislative body meetings are, of course, public under the Sunshine Law.

414. D. Magruder, *The Influence of "Goldfish Bowl" Bargaining in Education* (Apr. 2, 1976) (on file with D. Magruder, Executive Director of Florida School Boards Association, Tallahassee, Florida). *The Influence of "Goldfish Bowl" Bargaining in Education* was presented at the Association of Educational Negotiators' convention in New Orleans on April 2, 1976.

become forums for grandstanding and posturing; media reporting hardens positions—statements made publicly are difficult to retract; audiences are frequently composed primarily of union members, with outbursts and demonstrations disrupting and delaying negotiations; negotiations are more expensive—larger facilities are required, press accommodations are often necessary, and notices must be printed and distributed; and often the public and press attend only sporadically, leading to inaccurate and fragmented public opinion. From a questionnaire sent to school board members, superintendents, school negotiators, and members of the news media, Magruder concluded that the consensus among those responding was in favor of “goldfish bowl” bargaining, but that privacy should be permitted during impasse or if mediators or arbitrators are employed.⁴¹⁵

In November, 1975, the author of this article also sent out an informal questionnaire to certain public employers and employee bargaining representatives in Florida to assess generally the reactions to the Sunshine Law and its effects on the bargaining process to that point. The results were roughly similar to those obtained by Magruder. More than sixty percent of the public employers anticipated problems with public collective bargaining sessions and would have preferred private sessions. The majority of the union representatives favored bargaining in the sunshine. Both sides reported that members of the public attended less than half of the sessions, and similar results were reported for media attendance.⁴¹⁶

The majority of those responding from both sides also agreed that positions of the parties should be reported publicly whenever PERC is asked to provide outside assistance and an impasse occurs; that factfinding hearings should be open to the public; and that positions and last offers of the parties should not be formally stated periodically or after each session. Generally speaking, the public unions favored more disclosure and the public employers favored less. Employee organizations generally preferred requiring mediators to furnish reports on the parties' positions, and releasing factfinders' reports to the public and the press at the same time they are sent to the employer and the employee organization. Additionally, the unions felt that agreements reached at the table should be made public prior to ratification by either side.

415. *Id.* at 10.

416. Unpublished study (on file with author). The results of the informal questionnaire are not offered as empirically valid. The results must be tempered by the fact that relatively few persons were sampled and bargaining experience to that date (1975) had been relatively modest.

The Sunshine Law has had a decided impact on the operation of PERC as well. Because many of PERC's functions are quasi-judicial in nature, there has been some feeling at PERC that these functions should be exempt from the Sunshine Law. In *State Department of Pollution Control v. State Career Service Commission*, the First District Court of Appeal held that deliberations of the commission following a hearing incident to an appeal by a dismissed employee were quasi-judicial in nature and therefore exempt from the Sunshine Law.⁴¹⁷ This holding was in response to a request by the parties and the attorney general, as amicus curiae, for a final determination classifying deliberations made after a case had been submitted to PERC or to an appellate court for consideration. The court stated that "[t]hose labors are, therefore, quasi-judicial and are not subject to Chapter 286, Florida Statutes."⁴¹⁸

The issue now appears to have been resolved by the action of the Florida Legislature during its 1977 session. Perhaps in reaction to the conflicting opinions of the courts, the section of PERA dealing with PERC operations was revised to read as follows: "The deliberations of the commission in any proceeding before it shall be exempt from the provisions of chapter 286 [Sunshine Law]."⁴¹⁹ There can be little doubt now, given legislative creation of such a specific exemption, that PERC deliberations are closed to the public.

Collective bargaining in the sunshine is a fait accompli in Florida. Surprisingly little litigation has resulted from the confluence of the Sunshine Law, *Bassett v. Braddock*, and PERA. The general practice of honoring sunshine bargaining may perhaps be attributed to a shared desire to open the bargaining process to public scrutiny. More likely, it is due to a reluctance on all sides to oppose publicly the popular concept of government in the sunshine.

417. 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975).

418. *Id.* at 849. The opinion ignored *Canney v. Board of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973). In *Canney*, the court noted that a combination of legislative and judicial functions in one body is clearly contrary to the separation of powers doctrine. The court also stated that a board exercising quasi-judicial functions is not part of the judicial branch of the government. The court said the Sunshine Law, enacted for the public's benefit, applies even if a board is acting in a quasi-judicial capacity.

Two attorney general's opinions written after *Canney* cited and agreed with that case. One opinion stated that members of a personnel board, acting as a quasi-judicial sentencing body, may not vote by secret ballot in the trial of an employee following a public session and deliberation. 1973 FLA. OP. ATT'Y GEN. 073-370. A later opinion, also citing *Canney* with approval, declared that the Sunshine Law applied to a quasi-judicial hearing of the Florida Board of Dentistry, the subject matter of which was an investigatory inquiry. 1974 FLA. OP. ATT'Y GEN. 074-84.

419. Act of June 24, 1977, ch. 77-343, § 7, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.205(10) (1977)). It should be noted that hearings and oral arguments remain open to the public.

III. CONCLUSION

Some final observations about Florida's experience with collective bargaining for public employees are in order.

To begin with, Florida's designation of the Board of Regents as the public employer responsible for negotiating contracts with faculty unions must be viewed as a wise choice. Experience so far has shown this to be a desirable feature of the Florida PERA. The statute allows the Governor to make recommendations to the legislature concerning impasse resolution between the faculty unions and the regents as employer. In addition, the Governor's traditional role of influencing legislative budgetary decisions has been left undisturbed. Thus, the prerogatives of the chief executive have not been jeopardized. Yet the statute allows contractual development concerning faculty employment relations in the university system to be made initially by the governing board of that system and by faculty unions through the bargaining process. This is as it should be.

There is a serious question as to whether PERC commissioners should serve "at the pleasure of the governor" as provided in the 1977 amendments, even though gubernatorial appointments are subject to senate confirmation. Undoubtedly there will be increased pressure to dominate PERC politically in the future. For one thing, rapid unionization of state and local government workers promises a significant amount of increased political influence by public employee unions. The absence of a right to strike or use of interest arbitration to resolve impasse disputes increases pressure on the unions to influence the governmental power structure through increased political activity. This might include PERC as a logical target.

Likewise, PERC should not be merely an administrative arm of the executive branch. With the rise in unionism among state workers, pressure may increase to influence PERC unduly to take employer-oriented positions through the Department of Administration. While it is true that thus far executive interference has been minimal, if not nonexistent, there is no guarantee of a hands-off policy for the future.

PERC's effectiveness would be substantially diminished if it were perceived as either pro-employer or pro-union. PERC should be viewed primarily as a quasi-judicial body and not as merely another executive agency. Ideally, the commission should be perceived as a court and the people of Florida should expect and require the same level of integrity from PERC that they expect from a court. Thus, the commission should be insulated as much as possible from political influence.

The legislature should authorize longer terms and staggered terms for commissioners. PERC staff workers and attorneys should be exempted from restrictive job classifications modeled after other state agencies. This would allow the commission greater flexibility in hiring and compensating professional assistance at a high level. The commission should be provided with broad authority to administer PERA, accompanied by fiscal independence in formulating its budget and its presentation to the legislature. This would encourage the development of the commission as a judicial body.

Perhaps the day will come when a merit selection process for commissioners will be implemented akin to that which is already employed in Florida for appellate judges.⁴²⁰ Such a system would have to be developed so as not to challenge the Governor's constitutional authority over the executive branch. This could be accomplished by the Governor's developing a formal merit selection process (that is, a nominating panel) which would produce a list of recommended candidates for the Governor's consideration. The system should be administered by reputable appointees, and it should be public enough to permit candidate suggestions from varied sources and to ensure due deliberation of qualifications. Surely it would be appropriate for the legislature to lay down general qualifications, as it already has done in the 1977 amendments.

Any selection process should take into account both the rightful demands of labor and the crucial dictates of good government in making the choices of commissioners. Neither a pro-labor nor an anti-labor commission will truly serve the public interest. Florida needs a commission with a fair and balanced perspective. Florida needs a commission which will consider the future needs of a changing state as well as the fleeting necessities of momentary confrontations between recalcitrant employers and impatient employees.

Was Florida's decision to include coverage of all public employees under PERA, rather than just certain segments of the public work force such as schoolteachers, a wise decision? It seems it was. It is fair to say that the comprehensive coverage of PERA has presented no more problems than would have occurred had only schoolteachers, firefighters, and police been included. It has encouraged uniform labor policy development. Comprehensive coverage is desirable because it encourages a consistent labor policy for both state and local government. Labor policy generated by limited geographic considerations apart from the state interest avoids the practical facts of labor relations life. The state has a continuing interest in

420. See FLA. CONST. art. V, § 11, cl. (b); *id.* § 20, cl. (c)(5).

maintaining labor peace throughout its educational system as well as in maintaining all governmental services.

Florida has not adequately addressed the problem of supervisory unionism. Because of PERA's silence, problems with supervisory unionism have been dealt with in a piecemeal fashion. Thus, school principals were excluded as managerial employees in 1975. PERC declared that supervisors have the right to unionize by virtue of its unit decision which places supervisory state workers in separate units. And some have been excluded as management by stipulation in preliminary negotiations over unit definitions.

But the problem of supervisory unionism should be addressed in the statute. This was not done in Florida, and other states contemplating public sector legislation would be well advised to so do. For example, the statute should face squarely the initial question of whether or not supervisory employees should have the right to unionize. If they do, the statute should determine whether supervisors may belong to the same union or be affiliated with a union which also represents employees they supervise. The statute should further declare whether the scope of negotiable subjects should be more narrowly defined where unionized supervisors are permitted to bargain with management. The Florida Legislature has yet to address this nagging problem as it should.

In contrast, the Florida statute has worked well in the matter of defining bargaining units. The statutory criteria preference for large, comprehensive units has proven both workable and desirable. Defining bargaining units for state workers by statute may be desirable. In Florida, it was done primarily by PERC rule for state workers, and this has proven to be highly efficient. The Florida technique has avoided needlessly extended and expensive representation proceedings. Initial state worker unit definition by rule or statute tends to diminish undesirable pressure for fragmented units.

Whether Florida's approach to impasse resolution by means of factfinding is also workable is difficult to evaluate at this point. There are, unfortunately, insufficient data and experience on which to base clear, unequivocal conclusions. What little evidence there is, however, leads to the tentative conclusion that factfinding can work in Florida. Realistically, there are few alternatives: there is already a constitutional ban on the strike,⁴²¹ and the 1978 Constitution Revision Commission has, foolishly I think, recommended a

⁴²¹ The Constitution Revision Commission has adopted for submission to the people only one proposal affecting labor. See note 85 *supra*. As incorporated into article I, § 6 of the current constitution, proposal no. 14 does not affect the prohibition against public employees' striking.

carte blanche constitutional ban on interest arbitration⁴²² regardless of whether the arbitration is by last offer, issue by issue, or package, or whether it applies only to a narrowly defined group of public employees. Consequently, factfinding would seem to be the only plausible alternative for Florida should the people vote to approve the recommendations of the revision commission.

It is probably fair to say that negotiations in the sunshine have not presented insurmountable problems. Generally, open negotiations have not substantially interfered with the bargaining process. On the other hand, the legislative decision to remove PERC deliberations from the sunshine has proven to be more functional by encouraging a more judicious approach to controversial issues. Open deliberations encouraged a more political and ambivalent approach to the deliberative process.

One of the appalling inadequacies in the Florida experience has been the rather random and haphazard efforts at field studies and research in attempts to evaluate the effectiveness of the Act. Unfortunately, Florida has no industrial labor relations institute designed to focus entirely on research in public labor relations. Moreover, PERC has not been funded sufficiently to permit it to undertake extensive research and data accumulation. Trade associations such as the School Board Association and, to a lesser degree, the public unions have produced some limited studies. But these studies, whether accurate or not, have not produced widespread acceptance because of their suspected bias. A resource to accumulate data and to conduct unbiased research is essential to the improvement of the bargaining process. So too, high-quality training institutes and the like are necessary for governmental officials, and unionists too, if responsible bargaining in the public interest is to become a reality.⁴²³

All in all, the Florida Public Employees Relations Act has worked well, and Florida's experiment with collective bargaining for public workers has been generally successful. Whether this success continues will depend, to a great extent, on the willingness of all parties to public labor disputes to look beyond their own immediate interests and consider the long-range concerns of the state. To be sure, self-interest will never be eliminated from labor negotiations. But

422. Proposal no. 14 of the Florida Constitution Revision Commission would add the following language to article I, § 6: "Binding arbitration is prohibited to resolve impasse in collective bargaining negotiations concerning wages, hours and terms and conditions of employment between public employees and a public employer." The people of Florida will vote on this proposal in November.

423. In its 1978 appropriations act, the Florida Legislature established, with modest funding, a Center for the Study of Employment Relations at Florida State University College of Law.

broader state interests must also be served. In the spirit of civility, the interests of the state as a whole can be furthered in the bargaining process by labor and management alike.

